Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

GREGORY C. WATTS,

Petitioner,

v.

THE CITY OF NORMAN, a political subdivision of the State of Oklahoma,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In determining whether to grant summary judgment under Fed. R. Civ. P. 56 in the *McDonnell Douglas Corp. v.Green pretext* stage of a discriminatory discipline case, should a judge consider the occupational status of the employment discrimination plaintiff for the purpose of determining whether he is "similarly situated" to his comparable(s) when it is undisputed that the plaintiff and his comparable(s) violated the same work rule in the same incident?

2. Is the standard for determining whether an employment discrimination plaintiff is "similarly situated" to his comparable(s) under Fed. R. Civ. P. 56 the same as the standard for determining whether he is "similarly situated" to his comparable(s) at trial?

3. Whether the "similarly situated" test is the same in the prima facie case and pretext stages of cases governed by *McDonnell Douglas Corp. v.Green?*

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED 1

STATEMENT OF THE CASE 2

A. COURSE OF PROCEEDINGS BELOW 4

B. STATEMENT OF FACTS 2

REASONS FOR GRANTING THE WRIT 6

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM SEVEN OTHER COURTS OF APPEALS 6

II. THE WIDESPREAD CONFUSION AMONG THE COURTS REGARDING AN APPROPRIATE STANDARD FOR DETERMINING WHETHER EMPLOYEES ARE SIMILARLY SITUATED IS FURTHER HIGHLIGHTED BY THE INTRACIRCUIT CONFLICT WITHIN THE SIXTH CIRCUIT 16

III. THIS CASE RAISES ISSUES OF SUBSTANTIAL NATIONAL IMPORTANCE 16

CONCLUSION 18

APPENDIX

CIRCUIT COURT ORDER (11/05/2001) 1a

DISTRICT COURT ORDER (05/23/2000) 17a

DISTRICT COURT JUDGMENT (05/23/2000) 31a

ORDER DENYING REHEARING (12/05/01) 32a

TABLE OF AUTHORITIES

CASES

ANDERSON V. LIBERTY LOBBY, INC., 477 U.S. 242 (1986) 17

ERCEGOVICH V. GOODYEAR TIRE & RUBBER CO., 154 F.3D 344 (6TH CIR. 1998) 16, 17

FURNCO CONSTR. CORP. V. WATERS, 438 U.S. 567 (1978) 12

FURUKAWA V. HONOLULU ZOOLOGICAL SOCIETY, 936 P.2D 643 (HAWAII 1997) 17

GORDON V. UNITED AIRLINES, 246 F.3D 878 (7TH CIR. 2001) 16

GOSSETT V. BD. OF REGENTS FOR LANGSTON UNIV., 245 F.3D 1172 (10TH CIR. 2001) 7

GRAHAM V. LONG ISLAND R.R., 230 F.3D 34 (2D CIR. 2000) 11

HARGETT V. NAT'L WESTMINSTER BANK, U.S.A., 78 F.3D 836 (2D CIR.), CERT DENIED, 117 S.CT. 84 (1996) 11

HARVEY V. ANHEUSER-BUSCH, INC., 38 F.3D 968 (8TH CIR. 1994) 14

HOLLINS V. FEDERAL NAT'L MTG. ASS'N, 760 A.2D 563(D.C. CT. APP. 2000) 17

JONES V. DENVER POST CORP. 203 F.3D 748 (10TH CIR. 2000) 11, 16

KENDRICK V. PENSKE TRANSP, SERVICES INC., 220 F.3D 1220 (10TH CIR. 2000) 10, 15

KROH V. CONTINENTAL GENERAL TIRE, INC., 748 N.E. 2D 36 (OHIO 2001) 17

MAGRUDER V. RUNYON, 844 F.SUPP. 696, 702 (D. KAN. 1994), affd., No. 94-3069, 1995 U.S. App. LEXIS 12291 (10th Cir. May 22, 1995) 13

MANNICCIA V. BROWN, 171 F.3D 1364 (11TH CIR. 1999) 13

MATTHEWS V. OCEAN SPRAY CRANBERRIES, INC., 686 N.E.2D 1303 (MASS.1997) 17

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 7, 9

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992) 13

Okoye v. University of Texas Houston Health Science Center, 245 F.3d 507 (5th Cir. 2001) 12

Perkins v. Brigham & Women's Hospital, 78 F.3d 747(1st Cir. 1996) 12

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000) 3, 10, 17

St. Mary's Honor Cntr. v. Hicks, 509 U.S. 502 (1993) 10

Taylor v. Brentwood Union Free Sch. Dist., 143 F.3d 679 (2d Cir.), cert. denied, 525 U.S. 1139 (1999) 11

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7, 9

Ward v. Procter & Gamble Paper Products Co., 111 F.3d 558 (8th Cir. 1997) 13

Watts v. City of Norman, 270 F.3d 1288 (10th Cir. 2001) 1

Statutes

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-2 1

Rules

Fed.R.Civ.P. 56(c) 17

Miscellaneous

Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205n. 304 (1981) 15

David L. Hudson, Jr., *Will the Sixth Circuit Stick to One Standard with Respect to 'Similarly Situated' Employees*, Tenn. B.J. 25 (November 2001) 6

Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 Cal. L. Rev. 1253n.201 (1998) 6

Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 Mich. L. Rev. 2229 nn. 206-07 (1995) 6

Adam C. Wit, *The 'Similarly Situated Individual': Evidence of Comparable Employees and Its Application in Employment Discrimination*, 23 Empl Rel. L.J. 31 (3/Winter 1997) 6

Gregory C. Watts respectfully requests the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit which affirmed the order of the District Court for the Western District of Oklahoma granting summary judgment in favor of the City of Norman on the basis that Mr. Watts did not satisfy his burden to present legally relevant evidence of pretext.

OPINIONS BELOW

The opinion of the Tenth Circuit, which is reported at *Watts v. City of Norman*, 270 F.3d 1288 (10th Cir. 2001), is reproduced in the Appendix at App. 1a - 16a. The May 23, 2000, opinion of the District Court is unreported. It is reproduced in the Appendix at App. 17a - 30a. The May 23, 2000, judgment of the District Court is unreported. It is reproduced in the Appendix at App. 31a. The December 5, 2001, Order of the Court of Appeals denying Appellant's petition for rehearing and rehearing en banc is unreported. It is reproduced in the Appendix at App. 32a.

JURISDICTION

The Court of Appeals denied Appellant's Petition for Rehearing on December 5, 2001. App. at 32a. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

The statute construed is Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, which says: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or"

Rule 56 of the Federal Rules of Civil Procedure provides in relevant part that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c).

STATEMENT OF THE CASE

Demoted from Captain to firefighter, petitioner, Gregory C. Watts, resigned his position and sued his former employer, respondent, City of Norman ("City"), on a claim of race discrimination. His claim of racial discrimination was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII").

A. Course of Proceedings Below

The Complaint was filed in the United States District Court for the Western District of Oklahoma where Mr. Watts resides. Mr. Watts challenged his demotion and constructive discharge by alleging Title VII's disparate treatment and mixed motive theories of discrimination. After filing its Answer, the City moved for summary judgment on the grounds that 1) Mr. Watts "cannot establish a *prima facie* of unlawful employment discrimination"; and, 2) "If the court concludes that Plaintiff can establish a *prima facie* case of employment discrimination his unsatisfactory job performance is a legitimate, non-discriminatory reason for any adverse employment decision Plaintiff may have suffered and there is no evidence of pretext." Mr. Watts opposed the motion by submitting evidence that Respondent's articulated non-discriminatory reason for its discriminatory disciplinary action, *i.e.*, that he had hit a subordinate employee in the

course of his employment and had used profane and abusive language in violation of department policy, was pretextual. On May 23, 2000, the District Court, without having the benefit of the *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), decision because it had not been issued yet, granted the City's motion and entered summary judgment in favor of the City. App. at 29a, 31a.

The District Court analyzed the summary judgment evidence under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) analytical framework applicable to employment discrimination cases based on circumstantial evidence. It held that Mr. Watts had made a prima facie case. App. at 7a, 23a. The District Court recited as one element of the prima facie case the requirement that "similarly situated white employees were treated more favorably." App. at 7a. The District Court granted summary judgment on the grounds that "[t]he evidence is not sufficient to create a material factual dispute that defendant's conduct was a mere *pretext* for racial discrimination." App. at 29a.

Mr. Watts appealed the summary judgment ruling to the Tenth Circuit. Citing Rule 56(c) of the Federal Rules of Civil Procedure, recent caselaw from this Court and the Tenth Circuit, he contended that, at the summary judgment stage, his version of the disputed facts and evidence must be believed and, pursuant to *Reeves*, the reviewing court should review the record as a whole and disregard all evidence favorable to the City that a jury is not be required to believe. Mr. Watts contended that the evidence created a genuine issue of material fact regarding pretext sufficient to withstand the City's motion because "[o]ne of the established methods of proving pretext is to show that the employer treated the plaintiff 'differently from other similarly situated employees who violate work rules of comparable seriousness.'" App. at 9a. Mr. Watts contended that the City's favorable treatment of Mr. Wilson in response to the October 31, 1998 fighting incident in the form of no

discipline, versus its recommendation to demote Mr. Watts, was evidence of pretext. App at 9a.

Notwithstanding the District Court's determination that Mr. Watts had established of his *prima facie* case which included the element of "similarly situated," the Tenth Circuit affirmed summary judgment in favor of the City on the basis that Mr. Watts and Mr. Wilson were not "similarly situated" at the *pretext* stage. It observed that "[u]nder our precedent, employees may not be 'similarly situated' when one is a supervisor and the other is not." App. at 9a (citations omitted). "[T]he comparison [is] not *'legally relevant'* because nonsupervisory and supervisory employees 'cannot be deemed similarly situated in a disciplinary matter such as this one.'" *Id.* (emphasis added). The Tenth Circuit held "[b]ecause of the difference in their *positions of employment*, we cannot hold that Watts and Wilson were similarly situated or that the City's decision to discipline only Watts is proof of pretext." App. at 12a. As a result, Mr. Watts failed to meet his "burden of proving that his demotion was based on intentional discrimination." App. at 16a.

B. Statement of Facts

The facts as drawn from the Petitioner's Briefs filed on his behalf in the Tenth Circuit Appeal, and as set forth in the Appendix, are as follows: Mr. Watts, a black male, began is employment with the City of Norman Fire Department in April 1976. At that time, there was an atmosphere of racial discrimination. Mr. Watts and other black employees were subjected to racially derogatory remarks. App. at 14a, 15a, and 24a. Mr. Watts was the first black firefighter to be employed by the City. He received several promotions and in 1988 was promoted to Captain. Mr. Watts was the first black Captain to be employed by the City. Prior to the physical altercation with Mr. Wilson on October 31, 1998, Mr. Watts satisfactorily performed the duties of Captain for ten years and had satisfactorily performed his employment duties with the City for 23 years without incident. Prior to the October

31, 1998, incident, Mr. Watts had never been disciplined by the City. App. at 18a.

On October 31, 1998, Mr. Watts was stationed at Fire Station Number 3 in Norman, Oklahoma. As Captain, he was in charge of the station. While performing his duties as Captain, Mr. Watts became involved in an oral confrontation with Charles Wilson, a white subordinate firefighter under his supervision. The oral confrontation escalated to a physical altercation when, according to Mr. Watts, Mr. Wilson suddenly headbutted him. Mr. Watts struck Mr. Wilson's in self-defense. App. at 4a. After investigating the fighting incident, the Assistant Fire Chief for the City of Norman, Johnny Vaughn, thought that both Mr. Watts and Mr. Wilson should be dismissed pursuant to the City's written and unwritten rules concerning fighting among firefighters. Unlike Mr. Watts, who had a 23 year spotless employment history with the City, Mr. Wilson had a reputation at work as being "about half hard to get along with" and "one of the guys that will fly off the handle real fast". App. at 5a. Mr. Vaughn testified in his deposition that the City's policies against fighting among firefighters did not make distinctions on the basis of occupational job status for disciplinary purposes or otherwise. He testified as follows:

> "the rules and regulations of our fire department stated that *no firefighter would ever strike another under* ***any*** *circumstances*. It doesn't address captain, firefighter, or anything else. Its just no firefighter shall have an altercation." App. at 6a. (emphasis added).

Another black firefighter for the City, Fred Henderson, testified that he had the same understanding regarding the Fire Department's blanket zero-tolerance policy against fighting. Notwithstanding that the City's Fire Department's written and unwritten rules against fighting did not base the level of discipline to be imposed on the

occupational status of the employee's position, the City decided to demote Mr. Watts from Captain to a nonsupervisory firefighter. The City did not discipline Mr. Wilson. App. at 10a, 14a, and 19a.

The City's decision to act contrary to its written and unwritten policies against fighting and to discipline only on Mr. Watts for the October 31, 1998, fighting incident was motivated by Mr. Watts' race. Regardless of their respective occupational statuses, the City's discriminatory application of its policies against fighting among firefighters in favor of Mr. Wilson, is evidence of pretext sufficient to create a genuine issue of material fact to be resolved by a jury.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Conflicts with Decisions from Seven Other Courts of Appeals

This case represents the widespread confusion and conflict among[1] and within[2] the Circuits, regarding how to define a "similarly situated" individual in a disparate treatment case based on circumstantial evidence and discriminatory discipline when the case is governed by the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting methodology. One of the most common and

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[1] *See, e.g.*, Adam C. Wit, *The 'Similarly Situated Individual': Evidence of Comparable Employees and Its Application in Employment Discrimination*, 23 Empl Rel. L.J. 31, 32-33 (3/Winter 1997); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 Cal. L. Rev. 1253, 1308 n.201 (1998); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, 2292 nn. 206-07 (1995).

[2] *See, e.g.*, David L. Hudson, Jr., *Will the Sixth Circuit Stick to One Standard with Respect to 'Similarly Situated' Employees*, Tenn. B.J. 25 (November 2001).

effective ways for an employment discrimination plaintiff to prove disparate treatment discrimination in a case based on circumstantial evidence and governed by the *McDonnell Douglas* analysis is to show that "similarly situated" employees not in the plaintiff's protected class received more favorable treatment from the employer. Although the "similarly situated" test is often used by employment discrimination plaintiffs to prove disparate treatment by circumstantial evidence in disciplinary actions, and other claims of employment discrimination based on race, color, sex, religion, national origin, disability, or age, the "similarly situated" test is also utilized to prove discrimination under other federal anti-discrimination statues such as Title IX. *See, e.g., Gossett v. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1177 (10th Cir. 2001)(Nursing student using "similarly situated" comparables to show his involuntary withdrawal from the university's nursing program was caused by gender discrimination in violation of Title IX).

The First, Second, Fifth, Sixth, Seventh, Eight, Tenth and Eleventh Circuits have articulated different standards for determining whether a given plaintiff is "similarly situated" to his suggested comparable employee(s). The Tenth Circuit decision conflicts with all the other Circuits that have considered the "similarly situated" test in a disparate treatment case based on discriminatory discipline when one employee is a supervisor and the other is not. In the Tenth Circuit, when one employee is a supervisor and the other is not the two cannot be deemed "similarly situated" for the purpose of proving pretext.

The Source Of Confusion

The "similarly situated" test has its origins in *McDonnell Douglas*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981). In *McDonnell Douglas*, a failure to rehire case, the plaintiff alleged that the

company refused to rehire him as a result of his civil rights activism. The company contended that it refused to rehire him because he had engaged in illegal activities against the company. The plaintiff established a prima facie case and the company met its burden of articulating a legitimate nondiscriminatory reason for its refusal to rehire the plaintiff. As to the plaintiff's remaining burden of showing that the company's proffered reason for refusing to rehire him was pretextual, this Court observed:

> "[B]ut the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit [the employer] to use [Plaintiff]'s conduct as a pretext for the sort of discrimination prohibited by § 703 (a) (1). On remand, [Plaintiff] must . . . be afforded a *fair opportunity to show* that petitioner's stated reason for [Plaintiff]'s rejection was in fact *pretext*. *Especially relevant* to such a showing would be evidence that *white* employees involved in acts . . . of *comparable seriousness* . . .were nevertheless retained or rehired . . . In short . . . *[Plaintiff] must be given a full and fair opportunity* to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision."

McDonnell Douglas, 411 U.S. at 804-05 (emphasis added).

Three years later in *McDonald v. Santa Fe Trail Transp. Co.*, a discriminatory discipline case, two white employees were discharged for misappropriating company property while a black employee who had been charged with the same crime was retained. The white employees sued. As to their burden of showing *pretext*, this Court again focused on the *race* of the comparable employees and their *acts*. As

in *McDonnell Douglas*, in *McDonald v. Santa Fe Trail Transp. Co.*, this Court did not refer to the occupational status or job position of the comparables when it observed:

> "precise equivalence in *culpability between employees is not the ultimate question*: as we indicated in *McDonnell Douglas*, an allegation that other employees involved in *acts* against [the employer] of *comparable seriousness* . . . were nevertheless retained . . . is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a *pretext*.
>
> * * *
>
> It may be that theft of property . . . is a more compelling basis for discharge than obstruction of an employer's traffic arteries, but this does not diminish the *illogic in retaining* guilty *employees of one* ***color*** while *discharging those of another* ***color***."

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. at 283 n. 11, 284 (emphasis added).

By holding that a supervisor cannot be "similarly situated" to a nonsupervisory employee "in a disciplinary matter such as this one", the Tenth Circuit decision, like those of many other Circuits, frustrates the "full and fair opportunity" mandate of Title VII applicable to the pretext stage. The pretext stage enables a plaintiff to show that the employer's proffered nondiscriminatory reason for the alleged discriminatory action is in fact a pretext for unlawful discrimination. *See McDonnell Douglas*, 411 U.S. at 804-05; *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 282; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 258; *St. Mary's Honor Cntr. v. Hicks*, 509 U.S. 502, 507-08

(1993); and, *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097, 2106 (2000)(applying *McDonnell Douglas* analysis pursuant to the ADEA). It was apparently formulated by this Court "to insure that plaintiffs have a 'full and fair opportunity' to make the showing of causation that is necessary to establish liability." Belton, infra note 4 at 1273. The Tenth Circuit's insertion of the supervisor/nonsupervisor occupational status prong into the similarly situated analysis as a matter of law conflicts with decisions from seven other Circuits which have attempted to interpret and apply the test. Moreover, it is found nowhere in this Court's *McDonnell Douglas* and *McDonald v. Santa Fe Trail Transp. Co.* decisions.

The Tenth Circuit Standard
Same Supervisor/Same Standards

In the Tenth Circuit, "[a]n employee is similarly situated to the Plaintiff if the employee deals with the same supervisor and is subject to the 'same standards governing performance evaluations and discipline'" (Citations omitted).

> "A court should also compare the relevant employment circumstances, such as work history and company policies, applicable to the Plaintiff and the intended comparable employees in determining whether they are similarly situated." *Kendrick v. Penske Transp, Services Inc.*, 220 F.3d 1220, 1232 (10th Cir. 2000)

Different "Similarly Situated" Standards Among the Circuits

A. Question of Law versus Question of Fact

The Tenth Circuit's decision most squarely conflicts with decisions of the Second Circuit. In the Tenth Circuit, regardless of the facts, an employment discrimination plaintiff alleging disparate treatment on the basis of discriminatory discipline cannot compare the employer's favorable treatment of another employee who violated the same work rule in the same incident in order to establish pretext when one is a supervisor and the other is not. App. at 9a (*citing Jones v. Denver Post Corp.* 203 F.3d 748, 753 (10th Cir. 2000)).

In the Second Circuit, the question of whether two employees are "similarly situated" is a *question of fact* for the jury, even when one is a supervisor and the other is not. *See Hargett v. Nat'l Westminster Bank, U.S.A.*, 78 F.3d 836, 839-40 (2d Cir.), *cert denied*, 117 S.Ct. 84 (1996)(jury asked to decide whether supervisor was similarly situated to nonsupervisory employee). *See also Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000)(observing that the issue of whether two employees are "similarly situated" is usually a fact question for jury); *Taylor v. Brentwood Union Free Sch. Dist.*, 143 F.3d 679, 684 (2d Cir.), *cert. denied*, 525 U.S. 1139 (1999)(similarly situated issue is a fact question for jury).

What separates the Tenth Circuit decision from the Second Circuit decisions is the fundamental difference of opinion between "who should decide" whether two employees are "similarly situated" when they both violate the same work rule in the same incident and one is a supervisor and the other is not, *i.e.*, a judge or the jury. The Tenth Circuit's rigid, mechanized and ritualistic approach to deciding the "similarly situated" issue at the *pretext* stage of analysis when one employee is a supervisor and the other is not is contrary to this Court's teachings and flexible

application of the *McDonnell Douglas* methodology regarding the *prima facie case*. Cf. *Swierkiewicz v. Sorema N.A.*, *No. 00-1853*, slip op. at 534 U.S. ___, 5-6 (Feb. 26, 2002)[3]; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)("never intended to be rigid, mechanized, or ritualistic"); and, *McDonnell Douglas*, 411 U.S. at 802 n.13 ("[T]he specification . . . the prima facie proof required of respondent is not necessarily applicable in every respect to differing factual situations").

B. Prudent Person

The First Circuit employs the *prudent person* standard. *See, e.g., Perkins v. Brigham & Women's Hospital*, 78 F.3d 747, 751 (1st Cir. 1996)(*applying* the "*prudent person*" standard and *holding* "[a] claim of disparate treatment based on comparable evidence must rest on proof that the proposed analogue is similarly situated in *material* respects."). Under this standard, the similarly situated test "is whether a 'prudent person,' looking objectively at the incidents would think them roughly equivalent and the protagonists similarly situated."

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[3] In some respects this case presents issues analogous to those recently addressed by this Court in *Swierkiewicz v. Sorema N.A.*, No. 00-1853, slip op., at 534 U. S. ___(Feb. 26, 2002), but at the *evidentiary* burden of *proof* stage. In *Swierkiewicz*, this Court addressed a plaintiff's pretrial *pleading* burden under the Rules 8(a), 9, and 12(b)(6) of Federal Rules of Civil Procedure in an employment discrimination case based on circumstantial evidence in order to withstand a motion to dismiss. This case presents issues regarding a plaintiff's pretrial *evidentiary* burdens *of proof* at the *prima facie* case and *pretext* stages of analysis in an employment discrimination disparate treatment case based on circumstantial evidence in order to withstand a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

C. Nearly Identical

The Fifth and Eleventh Circuits utilize the *nearly identical* standard. *See Okoye v. University of Texas Houston Health Science Center*, 245 F.3d 507, 514 (5th Cir. 2001)(applying *nearly identical* standard); *Manniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999)("We require that the quantity and quality of the comparator's misconduct be *nearly identical* to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.")(emphasis added).

D. Similar in All Respects

In *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992), the Sixth Circuit articulated the most rigid "similarly situated" test –the similar in all respects test. This test, formulated in the context of the *prima facie* case, mandates that in order to be deemed similarly situated the plaintiff must show "that the 'comparables' are similarly situated *in all respects*." (emphasis in original). They "must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *See also Magruder v. Runyon*, 844 F.Supp. 696, 702 (D. Kan. 1994), affd., No. 94-3069, 1995 U.S. App. LEXIS 12291 (10th Cir. May 22, 1995)("the plaintiff must show that the 'comparables are similarly-situated *in all respects*.")(emphasis in original).

E. Same Offense

A comparison of the Tenth Circuit's decision in Mr. Watts' case and the Eight Circuit's decision in *Ward v. Procter & Gamble Paper Products Co.*, 111 F.3d 558, 559 (8th Cir. 1997), illustrates the necessity for guidance from this

Court regarding how to implement a uniform standard for the "similarly situated" test in employment discrimination disparate discipline cases based on circumstantial evidence. In Mr. Watts' case, a black supervisor involved in a physical altercation with a white subordinate was disparately disciplined allegedly for violating the rule against fighting while the white subordinate was not disciplined for violating the same rule. The Tenth Circuit held that they could not be deemed "similarly situated" as a *matter of law* for the purpose of establishing pretext because one was a supervisor and the other was not. As in Mr. Watts' case, the black employee contended that she struck the white employee after she was provoked. As in Mr. Watts' case, the two employees involved in the same incident were not deemed similarly situated, but for different reasons.

In *Ward v. Procter & Gamble Paper Products Co.*, a black nonsupervisor who struck her white supervisor was discharged for striking her supervisor while the white supervisor was retained. The Eighth Circuit rejected the subordinate's claim of disparate discipline and determined that the two were not similarly situated for the purpose of pretext. The test for "similarly situated" in the Eighth Circuit is "[e]mployees are similarly situated when they are involved in or accused of the *same offense* and are disciplined in different ways." *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994). As in Mr. Watts' case, the black was disciplined more harshly than the white employee involved in the same altercation. In *Proctor & Gamble*, the two employees were not deemed to be "similarly situated" for the purpose of showing pretext, not because of the supervisor/nonsupervisor (occupational status) distinction as a matter of law, which was the case in *Watts*. They were not similarly situated because "their offenses were quite different." Whereas the Tenth Circuit decision in *Watts* focused on *occupational status* in the similarly situated analysis in the pretext stage, the Eighth Circuit focused on *conduct*. Both decisions arguably conflict with this Court's decisions in *McDonnell Douglas* and in *McDonald*. The Tenth

Circuit's decision conflicts with precedent in the Eight Circuit in which the court looks not only to the *occupational status* of the plaintiff and his comparable employee(s), but also examines the underlying *facts* of the *conduct*. The factual analysis present in the Eighth Circuit's "same offense" standard is not available to a supervisor plaintiff in the Tenth Circuit. Regardless of the mitigating or aggravating facts present in a given situation, a supervisor in the Tenth Circuit, as a matter of law, is unable to compare the employer's favorable treatment of a nonminority subordinate that would be available to the supervisor if he happened to reside in the Eighth Circuit.[4]

F. Prima Facie Case v. Pretext Stage

Another source of confusion and conflict among the courts below highlighted by the Tenth Circuit decision is whether to apply the similarly situated test in the *prima facie case* stage of the *McDonnell Douglas* analysis, in the *pretext* stage, or in both. For example, the Tenth Circuit decision conflicts with precedent of the Seventh Circuit regarding the "similarly situated" requirement for the establishment of a *prima facie* case. In the Tenth Circuit, it is no longer a required element of the prima facie case for a "similarly situated" employee outside the protected class to have been treated more favorably by the defendant. App. at 8a (*citing Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 119 (10th Cir. 2000). However, the authority cited by the Tenth Circuit in this case in support of its determination that Mr. Watts was not similarly situated to Mr. Wilson for the purpose of demonstrating *pretext*, *Jones v. Denver Post*

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[4] A review of *Watts* and *Harvey* highlight a concern raised over twenty years ago about the need for guidance from this Court regarding the pretext stage of the *McDonnell Douglas* analysis and Title VII's mandate that plaintiffs be afforded a "full and fair opportunity" to demonstrate pretext. *See* Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1273-74 n. 304 (1981).

Corp, 203 F.3d 748, (10th Cir. 2000), held that a supervisor cannot be similarly situated to a nonsupervisor for the purpose of establishing a *prima face case.*

In the Seventh Circuit, the fourth element of the *prima facie case* is that a similarly situated employee outside the protected class was treated more favorably by the employer. *See Gordon v. United Airlines*, 246 F.3d 878, 886 (7th Cir. 2001).

II. The Widespread Confusion Among the Courts Regarding an Appropriate Standard For Determining Whether Employees Are Similarly Situated Is Further Highlighted By the Intracircuit Conflict Within the Sixth Circuit

The Sixth Circuit has backed away from the *Mitchell v. Toledo Hosp.*'s rigid standard of similarly situated ***in all*** *respects*, and currently uses the similarly situated ***in all relevant*** *respects* standard. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998). As a result, there is an intracircuit split within the Sixth Circuit. *See, supra* note 2, David L. Hudson, Jr., *Will the Sixth Circuit Stick to One Standard with Respect to 'Similarly Situated' Employees*, Tenn. B.J. 25 (November 2001).

III. This Case Raises Issues Of Substantial National Importance

Even State Supreme Courts and the District of Columbia Court of Appeals looking to the federal courts and Title VII jurisprudence for *nonbinding guidance* regarding the standard to apply when determining what constitutes "similarly situated" employees in employment discrimination cases based on *state law. See, e.g., Furukawa v. Honolulu Zoological Society*, 936 P.2d 643, 648-51 (Haw.

1997)(*adopting "all relevant aspects"* standard); *Matthews v. Ocean Spray Cranberries, Inc.*, 686 N.E.2d 1303, 1310 (Mass.1997)("*in all relevant aspects*" in pretext stage); *Hollins v. Federal Nat'l Mtg. Ass'n*, 760 A.2d 563, 578 (D.C. Ct. App. 2000)("*nearly identical*"); and, *Kroh v. Continental General Tire, Inc.*, 748 N.E. 2d 36, 37-39 (Ohio 2001)(*rejecting Mitchell v. Toledo Hosp. "in all respects"* approach and *adopting "all of the relevant aspects"* similarly situated standard in light of *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998)).

Summary judgment is appropriate if there are no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim on intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2111 (2000). To survive summary judgment, Mr. Watts needed to "only present evidence from which a jury might return a verdict in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 257.

This Court has never imposed an "occupational status" requirement into the "similarly situated" analysis, but has focused instead on "acts of comparable seriousness" in the *pretext* stage of analysis in order to *assist*, rather than *frustrate*, employment discrimination plaintiffs in meeting their burdens based on circumstantial evidence. The Tenth Circuit's contrary decision and the widespread confusion and conflicts among and within the Circuits constitutes an issue of national importance, worthy of review and resolution by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail the end of each document.)
No. 00-6208

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GREGORY C. WATTS,
Plaintiff - Appellant,

v.

THE CITY OF NORMAN, a political subdivision of the State of Oklahoma,
Defendant - Appellee.

November 5, 2001, Filed

COUNSEL:
Ken Feagins (with Stanley M. Ward, and Woodrow K. Glass on the briefs) of Norman, Oklahoma, for the appellant.

Rickey J. Knighton, II (with Jeff H. Bryant and Jeff F. Raley on the brief) of Norman, Oklahoma, for the appellee.

JUDGES:
Before TACHA, Chief Judge, GIBSON, * and LUCERO, Circuit Judges.

OPINIONBY:
JOHN R. GIBSON

OPINION:

JOHN R. GIBSON, Circuit Judge.

Gregory C. Watts appeals from the district court's entry of summary judgment against him in his employment discrimination suit against the City of Norman, Oklahoma. Watts, who terms himself an Afro-American, was a captain in the Norman fire department when he became involved in a

physical confrontation with one of his subordinates, whom Watts describes as Caucasian. After this incident, the department disciplined Watts by demoting him from captain to firefighter. Watts retired rather than accept the demotion. He sued the City under Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e-5* (1994) and *42 U.S.C. § 1981a* (1994), alleging that the City terminated his employment on account of his race. The district court held that Watts did not come forward with evidence that the City's announced reason for demoting him was a pretext for racial discrimination. The court therefore entered summary judgment for the City. Watts contends that he did show pretext by showing that the department failed to apply the same discipline it meted out to him to the Caucasian subordinate who was involved in the incident. We affirm.

In this procedural posture, we recite the version of the facts most favorable to Watts.

When Watts began work for the Norman fire department in 1976, certain co-workers told him that other members of the Norman fire department would not work with him because of his race and that they would make racist remarks. Also at that time, Watts heard the use of the word "nigger" at the fire station, and he heard it once at a retirement party. At his deposition in this case, Watts did not testify about any such events occurring within the last ten years.

The City's decision to demote Watts arose out of the events of October 31, 1998. About seven o'clock that morning, firefighter Charles Wilson complained to Watts about Watts's personal use of the station laundry facilities. According to a written narrative Watts made later that day, the exchange was already acrimonious. Watts wrote, "Shortly after 7am, Firefighter Chuck Wilson viciously and virulently, verbally blew up at me in the rear bedroom by the washing/drying machines." Watts also described Wilson's speech in the bedroom as a "vile barrage of words." Wilson said, in crude language, that Watts was annoying him and "everyone" else.

Watts left the bedroom and prepared to shave, but before shaving he went to ask two other firefighters about what Wilson said. According to Watts, "To better gauge this

incident, I briefly inquired about how I was operating the Station with two other 'A' Crew Firefighters, Brian Starkey and Paul Harvey. . . ."

Then Watts shaved, "while reflecting on what had transpired," as he said.

At eight o'clock, an hour after the first incident, Watts again looked up Starkey and Harvey, to talk more with them about Wilson's assertion that Watts was annoying everyone. Watts said,

> Due to the hot temper and ill will displayed by Firefighter Wilson, at 8:00 am I asked Firefighter Starkey and then Firefighter Harvey to visit with me one at a time in the truck room. To avoid tunnel vision and to keep a broad and flexible perspective, I asked each one for their observations of how I was operating the Station.

Watts next asked Wilson to come talk to him in the truck room of the station. Wilson did not come. After waiting a while, Watts went and asked Wilson again to come to the truck room. Still Wilson did not come. Watts sent Starkey and Harvey to ask Wilson to come. When Wilson still did not come, Watts said he went to Wilson and "told him in a clear and precise cuss language that he should comply." Wilson did not.

Watts decided to have his talk with Wilson on the spot. Watts began to pace, which according to other testimony was a habit of his. According to Watts, Wilson began to imitate his pacing:

> I used Civility, Patience and Empathy as I paced back and forth.
>
> Firefighter Wilson then began to mimic my pacing in a bizarre and erratic fashion, with a stooped-over posture and to imitate my attempts to have him communicate with me

about how I was running the station. This temper tantrum display continued for a few minutes.

As I stopped pacing and stood still, Firefighter Wilson started ranting and raging in a loud contemptible voice reflected with an exaggerated facial expression, about how he felt I was paranoid. He then came in front of me, stopped mimicking my pacing, and stood up erect.

Finally, he got in my face about one foot distance, squared off, never answering the root question of how he felt I operated the station and continued to argue.

Without warning Firefighter Wilson viciously head butted me. He stuck his forehead into my forehead and continued to aggressively lean into me. The head butt sounded loud and for an instant I saw stars. With no premeditation, I instinctively removed his head from my face with my opened right hand, protecting myself, and did not follow up with further re-action to being struck on my forehead by Firefighter Wilson.

Wilson immediately telephoned Assistant Fire Chief Johnny Vaughn. Vaughn came to the station to investigate. The first thing Vaughn did was talk to Watts. Vaughn testified in his deposition that Watts began talking about defending himself. Vaughn testified:

And all of a sudden-and I am not positive about what it was that Greg said that triggered my thought pattern, but I asked-I said, "Greg, what have you done here? Did you hit him?"

And by this time, even in the conversation, Greg was very upset. He was mad. And it was something to the nature of doing his hands like this (indicating) clapping real loud. And

he said, "You goddam right. Right up side his head."

Vaughn testified that Watts claimed Wilson had butted his head, but Vaughn observed that "Captain Watts didn't show any redness or a knot or anything else to where I could be sure that he had been head-butted." At this point, Vaughn decided that Watts was too agitated to run the fire station that day, so he sent him home for the day. Vaughn asked Watts to provide him with a written statement about the incident, and Watts provided two different statements (which formed the basis for the foregoing statement of facts).

Next, Vaughn interviewed Wilson. Vaughan understood that Wilson had a reputation of being "about half hard to get along with" and that he was "one of the guys that will fly off the handle real fast." According to Vaughn, Wilson said that he and Watts "got into it about the laundry. " Then Wilson either said that Watts had slapped him or that he had punched him-at his deposition, Vaughn wasn't sure which Wilson had said. Vaughn could see that the left side of Wilson's face was swollen and red down to his ear. He told Wilson that Watts said Wilson butted him in the head, and Wilson denied this, saying that although their heads were close, he did not touch Watts. Vaughn decided Wilson was also too agitated to stay at work, so he sent him home. Wilson, too, provided a written statement of his side of the story. Vaughn mentioned that in his written report, Wilson stated that the two men's foreheads "may have touched." (Wilson's report actually says that Watts advanced on Wilson, who stood his ground so that "our foreheads touched, eyeball to eyeball.")

Vaughn also requested written reports from Firefighters Harvey and Starkey. Their accounts were very similar. Both said that Watts had approached them at about 6:50 a.m. to ask if they had a problem with him doing his laundry while on duty. Starkey said Watts was "in a very agitated state and seemed extremely upset." Both said Watts came back later to ask if they had complaints about how Watts ran the station. Later, Watts came looking for Wilson while they were with

him, and Watts told them to leave. As they left, they saw Watts come very close to Wilson, shouting. Harvey wrote: "As I was walking off I saw Greg jump into Chuck's face and at the top of his lungs yell to Chuck, 'I'm fucking in charge here. You're not fucking in charge.'" Starkey wrote, "Before turning and leaving, I saw Greg step very close to Chuck and did what I would describe as ranting and raving, flailing his arms and screaming obscenities. The best I can recall, Greg said, "I'm running this f... place you cocksucker." Both men said that they rounded the corner at that point and therefore could no longer see Watts and Wilson, but that they heard aloud slap. Both men also said that when they saw Wilson a short time later, Wilson asked if they had seen Watts hit him. They said that Wilson's face was "very red and puffy," "from his ear down the whole side of his cheek."

Wilson was assigned to another station while the department investigated the incident. Vaughn concluded that it was impossible to say which of the two men was the aggressor since there were no third-party witnesses and the two antagonists had contradictory stories: "It was his word against his word." Vaughn conveyed to the Fire Chief, John Dutch, the results of his investigation, consisting of his memorandum and the written statements of Watts, Wilson, Harvey, and Starkey. Vaughn's personal opinion was that both Wilson and Watts should be dismissed because "the rules and regulations of our fire department stated that no firefighter would ever strike another under any circumstances. It doesn't address captain, firefighter, or anything else. It's just no firefighter shall have an altercation." However, Fire Chief Dutch's decision was that Wilson would not be disciplined because the department could not prove "through statements or visuals or anything else, about the head-butt."

There was a pre-disciplinary hearing to consider Watts's case, attended by Watts and his attorney, a city attorney, a city personnel employee, the union president, Fire Chief Dutch and Vaughn. After the hearing, Fire Chief Dutch submitted a memorandum to the city personnel director, George Shirley, proposing that the City terminate Watts's employment. Dutch wrote:

> In summary, it is my finding that Captain Watts did verbally abuse a subordinate, using loud, offensive, profane, and vulgar language; that Watts did direct physically aggressive movements toward a subordinate; that Watts' actions have, in fact, intimidated and frightened employees in the Fire Department; and that Watts did physically strike a subordinate employee.

Shirley concurred with Dutch's decision. Dutch's proposal was subject to further review by city Manager Ron Wood.

Wood determined that Watts should be disciplined, but that the discipline should be demotion from captain to firefighter, rather than termination of employment. Wood wrote in a letter to Watts that the decision to discipline him was based on two grounds: first, the evidence that Watts struck a subordinate was very strong, while Watts's claim of self-defense was not corroborated, despite investigation; and second, regardless of who made the "initial contact," Watts failed in his duty as a supervisor by allowing the conflict to escalate to the point of violence, rather than simply sending Wilson home. Despite the gravity of Watts's conduct, Wood concluded that in light of Watts's long record of service with the City, demotion to a non-supervisory position, rather than firing, was the appropriate sanction.

Watts resigned rather than accept the demotion. He brought this suit against the City, alleging discriminatory termination of his employment on account of his race, in violation of Title VII, *42 U.S.C. § 2000e-2*(a) (1994).

The City moved for summary judgment. Proceeding under the McDonnell Douglas [1] framework, the District Court held that Watts had made a prima facie case. The Court concluded that Watts was a member of a protected class, that he suffered the adverse employment action of being demoted, and that he had performed his job satisfactorily up until the incident with Wilson. The Court recited as one element of the prima facie case the requirement that "similarly situated white employees were treated more favorably." Slip op. at 4

(citing *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)).* After the date of the district court's decision, we clarified that the fourth element of the prima facie case does not require comparison with a person outside the protected class. See *Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1229 (10th Cir. 2000).* However, the district court did not discuss whether Watts had shown evidence on this element. Instead, the district court moved on to hold that the City had borne its burden of producing a nondiscriminatory reason for disciplining Watts in that he had hit a subordinate employee in the course of his employment and had used profane and abusive language, in violation of department policy. Slip op. at 6-8.

To establish pretext, Watts relied on earlier instances of racially offensive language used within the department in the past and on the difference in the City's treatment of him and Wilson for their participation in the dispute. The district court held that the earlier instances of improper language were too remote in time to be relevant and had no causal connection with the disciplinary action. Slip op. at 13. The failure to discipline Wilson did not show discriminatory intent, the court held, even assuming the truth of Watts's contention that Wilson was the aggressor. The court stated that the critical question was whether the City had honestly believed in the reason it gave for disciplining Watts, not whether the fact finding underlying its reasoning was accurate. Slip op. at 14. The court concluded that there was no evidence that the City's proffered reason for disciplining Watts was a pretext for discrimination, and so it entered judgment for the City. Id.

We reviewed novo the district court's grant of summary judgment, applying the same legal standards appropriate for the district court. *Kendrick, 220 F.3d at 1225.* Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding whether the moving party is entitled to summary judgment, we must view the facts in the light most favorable

to the nonmoving party, drawing all reasonable inferences in its favor. *Kendrick, 220 F.3d at 1225.*

For this appeal, the City does not dispute that Watts presented a prima facie case, and Watts does not dispute that the City articulated a legitimate, nondiscriminatory reason for disciplining him. Therefore, the only issue presented on appeal is whether there is evidence of pretext–in other words, evidence that a discriminatory reason more likely motivated the City or that the reason the City gave for its treatment of Watts was unworthy of belief, see *Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1317 (10th Cir. 1999).*

One of the established methods of proving pretext is to show that the employer treated the plaintiff "differently from other similarly-situated employees who violated work rules of comparable seriousness." *Kendrick, 220 F.3d at 1230; English v. Colorado Dept. of Corrs., 248 F.3d 1002, 1011 (10th Cir. 2001).* Watts argues that he showed pretext by showing that the City did not discipline Wilson for violating the rule against fighting. Watts bears the burden of establishing that he and Wilson were similarly situated. *Kelley v. Goodyear Tire & Rubber Co., 220 F.3d 1174, 1178 (10th Cir. 2000).*

The City responds that Watts and Wilson were not similarly situated because Watts was a supervisor and therefore had a greater responsibility not only to avoid fighting, but to actively defuse the explosive situation before it escalated into violence. Under our precedent, employees may not be "similarly situated" when one is a supervisor and the other is not. In *Jones v. Denver Post Corp., 203 F.3d 748, 752-53 (10th Cir. 2000),* an employee was disciplined for using his employer's telephone for outside business. He attempted to prove pretext by showing that his supervisor also used the telephone for outside business and was not disciplined for doing so. We held that the comparison was not "legally relevant" because non-supervisory and supervisory employees "cannot be deemed similarly situated in a disciplinary matter such as this one." *Id. at 753.*

The distinction between supervisors and non-supervisors is clearly relevant to whether we would expect the employees in this case to be treated the same in the absence of discrimination. An employer who entrusts greater authority to its supervisors than to ordinary employees surely can be expected to exact greater responsibility from them. Supervisors often have to manage difficult employees. The record in this case shows that the City had heightened expectations of its supervisory employees and also gave them authority to neutralize a deteriorating situation by such measures as sending a subordinate home. City Manager Wood explained the City's decision to demote Watts largely in terms of his failure to recognize and defuse an explosive situation. Wood wrote:

> Focusing solely on who made the initial contact confuses the primary issue in this matter.
>
> For a Supervisor to allow these events to escalate to a point of physical contact, in my view, is a complete mishandling of the situation. This method of supervision cannot be tolerated in this organization. As a supervisor, you should have looked for ways to diffuse the situation rather than yelling in the employee's face and escalating the confrontation. One option available to you as a Supervisor would have been making sure the direct order was clear, and then relieving the employee from duty with pay pending a recommendation for disciplinary action with review by your superiors. Your handling of this situation culminating in a physical confrontation with the subordinate is egregious, unacceptable, and would normally warrant termination from employment.

Wood said that while Watts's long record of service and lack of prior disciplinary problems argued in his favor, "it does

concern me that even in our meeting on January 8, that you failed to recognize that you mishandled the situation as a Supervisor and continue to claim that you are the 'victim.' I have no confidence in your continuing in a supervisory capacity with the City of Norman."

Regardless of who hit whom, Watts's own statements gave the City reason to conclude that Watts escalated a situation rife with potential for violence and in fact used his position as supervisor to do so. Watts's narrative statement describes Wilson as intensely hostile at their first encounter at 7:00 a.m. Watts said Wilson "viciously and virulently, verbally blew up at me" and launched a "vile barrage of words." Watts says that he was aware that Wilson was subject to "mood swings." Watts left the room and went to shave. At 8:00 a.m. he looked up Starkey and Harvey to talk about the laundry room incident. Next, he ordered Wilson to come talk to him. When Wilson did not come, Watts ordered Starkey and Harvey to tell him to come. Next, Watts went personally to tell Wilson in "cuss language" that he should comply with Watts's order. Wilson still would not obey, so Watts went to him to engage him in a discussion. Taking Watts's narrative at its word, it should have been clear by that time that Watts and Wilson were not about to have a constructive exchange. Watts said that Wilson engaged in a "temper tantrum" that continued for a "few minutes." He said Wilson then began "ranting and raging in a loud contemptible voice reflected with an exaggerated facial expression." Watts contends he was still trying to engage in a conversation with Wilson as Wilson "got in my face about one foot distance, squared off, never answering the root question of how he felt I operated the station and continued to argue." Only after this protracted warm-up did Wilson finally butt Watts, according to Watts's statement. Taking the facts from Watts's own statement, it appears that Watts failed to short-circuit a potentially violent dispute by sidelining a subordinate who had become unhinged. Further, he used his position as supervisor to gain the chance to be alone with Wilson and to continue their dispute, despite evidence that Wilson had lost control of himself.

Watts's managerial failure fundamentally distinguishes his situation from Wilson's. After all, the challenged discipline here was to reduce Watts to Wilson's rank. Because of the difference in their positions of employment, we cannot hold that Watts and Wilson were similarly situated or that the City's decision to discipline only Watts is proof of pretext.

The City further relied on another crucial difference between the two cases in making its decision to discipline Watts and not Wilson–the qualitative difference in the proof against the two men. Watts contends that we are bound at this procedural stage to hold the City responsible in accordance with his version of the facts. Although we are, of course, bound to view the facts in the light most favorable to the non-movant, Watts misconceives which facts are relevant. Regardless of what really happened between the two men, in judging the City's response, we must evaluate the facts available to the City at the time of its decision. In determining whether the proffered reason for a decision was pretextual, "we examine the facts 'as they appear to the person making the decision.'" *Selenke v. Med. Imaging of Colorado, 248 F.3d 1249, 1261 (10th Cir. 2001)* (quoting *Kendrick v. Penske Transp. Servs., 220 F.3d at 1231).*

The City investigated the incident thoroughly before making any decision, holding a pre-disciplinary hearing at which Watts was represented by counsel. The City had the statements of Starkey and Harvey that an agitated Watts sought out Wilson and sent them away so he could be alone with Wilson; that Watts was shouting obscenities at Wilson; that they heard a slap; and that Wilson's face was red and swollen immediately afterwards. The City had Vaughn's evidence that Watts had admitted striking Wilson in the head, that Watts had no marks of a blow on his head, and that Wilson's face was red and swollen. The City had conflicting statements by Wilson and Watts, each claiming the other hit him and each denying hitting the other. City Manager Wood concluded:

> It cannot reasonably be disputed that you, the Supervisor, struck a subordinate during the

> exercise of your authority as a Supervisor. This is clear from the events that led up to the confrontation, the observations of the other employees, the sound of physical contact heard by the other employees, the redness of the face of the subordinate, and by your own admission.

On the other hand, the City lacked objective evidence that Wilson had struck Watts. Whereas Vaughn reported that Watts admitted striking Wilson, Wilson always denied striking Watts. City Manager Wood wrote to Watts, "There is no corroborating evidence to support your claim that you were head butted such as a bruise or swelling or observation by other employees. Whether you were head butted by the subordinate appears to be your word against the subordinate's word." Fire Chief Dutch decided not to discipline Wilson because the City could not prove he struck Watts "through statements or visuals or anything else," except, of course, for the word of his antagonist.

Importantly, while Watts contends that his version of the story is correct and Wilson's is false, he does not dispute the City's account of the state of the evidence before it. Nor does Watts fault the City's investigatory methods. He only faults the City's determination of appropriate discipline for the two men, arguing that Watts had a "23 year spotless track record with the City" and Wilson had a reputation for "flying off the handle." This Court has no need and no authority to determine what really happened between the two men or what discipline would have been appropriate to each. See *Selenke, 248 F.3d at 1261* (court may not second-guess employer's business judgment); *Bullington, 186 F.3d at 1318 & n.14* (court's role not to determine if employer's decisions "wise or fair," but whether they were discriminatory). Our task in this case is only to say whether the men were "similarly situated" so that the City's different disposition of their two cases is evidence of pretext. The existence of corroborating evidence in Watts's case and the absence of such evidence in Wilson's case is a crucial difference from the point of view of an employer trying to decide what disciplinary measures it ought to mete out to the respective

employees and, for that matter, what actions it could later defend if challenged by the disciplined employee. Wilson was therefore not similarly situated to Watts, and the Wilson case therefore does not provide the pretext evidence Watts needs. See *Kendrick, 220 F.3d at 1232-34* (where undisputed facts indicate substantial difference in circumstances, different treatment is not evidence of pretext); *Kelley, 220 F.3d at 1178-79.*

Watts argues briefly that the evidence of racially offensive language within the department in the past should be considered evidence that the discipline decision was discriminatory.

There is evidence in the record from three Afro-American municipal employees about racist language: Watts; George Shirley, the City's personnel director; and Fred Henderson, another firefighter. At his deposition, Watts did not testify about any such language being used within the last ten years. He said that in 1976, when he started work, one person told him he would have to endure racist remarks and hostility. At the same time, another person told Watts that the persons occupying the tailboard position on the fire trucks called themselves the "nigger tailboardmen," whether they were black or white. Still a third person referred to Oklahoma City as "nigger town" and "made mention of using that type of language to run the station." According to Watts, when the phrase "nigger town" was used at a retirement party, a former fire chief noticed Watts walking away from the conversation. Watts said that "Chief Akin took the time to come over and say, 'These things are going to happen. Don't let it get next to you.'" At his deposition, Watts testified that this incident happened more than ten years ago.

Henderson said in an affidavit that a captain called him a "nigger boy" in 1985, but that he objected to the captain at the time and has not heard such insults since then.

Shirley testified that when he was hired in the mid-seventies, the then-City Manager told him he would encounter a racist environment, but that if anything happened to him personally, he should bring it directly to the

City Manager. Shirley testified: "He said that so I would understand that he would support me."

The Supreme Court in *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151-53, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)*, emphasized the relevance of conduct showing discriminatory attitudes by the decisionmaker preceding the challenged decision. The Court held that such conduct was important evidence even though it was not made in the direct context of the challenged firing. *Id. at 152-53.* However, Watts's evidence of ambient racism in the department and the City falls far short of proving pretext, for reasons that are still valid after Reeves: the specific incidents were remote in time, dating from many years before the decision at issue in this case; they did not involve wrongdoing by anyone who participated in the challenged decision (although Shirley, a decisionmaker, was warned he might be subjected to racism, which cuts against the idea that he would condone racist treatment of Watts); the racist language was not addressed to Watts; and the comments had no bearing on ability to perform the job in question. See *English, 248 F.3d at 1010* ("Isolated, racist remarks by co-workers are insufficient" to establish discrimination in firing); *Heno v. Sprint/United Management Co., 208 F.3d 847, 856 (10th Cir. 2000)* (court admitting anecdotal evidence of discrimination should "scrutinize the time frame" and look for nexus to adverse employment action); *Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1210 (10th Cir. 1999)* (plaintiff must show nexus between statements and decision to fire); *Simms v. Oklahoma ex rel. Dep't of Mental Health and Substance Abuse, 165 F.3d 1321, 1330-31 (10th Cir. 1999)* (incident not similar for pretext purposes because of three years' time lapse); *Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994)* (isolated comments insufficient to show discrimination where speaker was not involved in making allegedly discriminatory decision and comments were not about plaintiff).

Because the City's announced reason for disciplining Watts was failure to live up to responsibilities which were not a part of Wilson's job, and because the evidence available to the City about the two men's misconduct differed

qualitatively, different treatment of the two men does not amount to evidence of pretext. Nor does Watts adduce other evidence sufficient to carry his burden of proving that his demotion was based on intentional discrimination. See *Reeves, 530 U.S. at 143.* We must affirm the district court's entry of summary judgment against Watts.

Footnotes

* The Honorable John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

[1] *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).* Watts initially pled a mixed-motive case in the alternative, but on appeal he does not argue that we should apply a mixed motive analysis or that he has presented direct evidence of discrimination.

CASE NO. CIV-99-1235-T

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

GREGORY C. WATTS,

Plaintiff,

THE CITY OF NORMAN,

Defendant.

ORDER

Before the court is the motion of defendant for summary judgment. Pursuant to Fed.R.Civ.P. 56, defendant contends that the undisputed material facts establish that it is entitled to judgment as a matter of law on plaintiff's claims of racial discrimination in employment. Plaintiff has responded to the motion.

Plaintiff, an Afro-American, held the position of captain with the fire department of the City of Norman ("City") until his resignation in December, 1998. His resignation was preceded by a recommendation to terminate his employment because of an altercation involving plaintiff and a subordinate firefighter. That recommendation was subsequently changed to a demotion to the position of firefighter. Plaintiff contends that this disciplinary action was motivated by racial discrimination. In its motion, defendant argues that plaintiff cannot establish a prima facie case of racial discrimination; alternatively, defendant contends that, even if plaintiff could do so, defendant has shown a legitimate nondiscriminatory reason for its action. Defendant also argues that it is entitled to judgment because plaintiff failed to exhaust the remedies available to him through his union contract.

Summary judgment may be granted where the undisputed material facts establish that one party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex

Corp. v. Catrett, 477 U.S. 317, 323 (1986). A material fact is one which may affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). To avoid summary judgment, plaintiffs must present more than a "mere scintilla" of evidence; the evidence must be such that "a reasonable jury could return a verdict for the non-moving party." Id.

The parties do not dispute that plaintiff was continuously employed by the City as a firefighter from 1976 until December, 1998 and that he received several promotions. In 1988, he was promoted to the position of captain, a position he held until he resigned in December, 1998 after the City recommended his demotion to firefighter because of an incident involving plaintiff and one of his subordinates. It is also not disputed that plaintiff was the first black firefighter hired by the City and that he was the first black to serve as captain. The parties do not dispute that, on October 31, 1998, plaintiff was involved in a physical altercation with Charles Wilson, a Caucasian firefighter under plaintiff's supervision. The incident occurred at the fire station while both were on duty, and it began with a dispute over the use of the station's laundry facilities[1]. Two other firemen, Brian Starkey and Paul Harvey, were present at the time of the incident. Both observed plaintiff yelling and cursing at Wilson, after Wilson refused plaintiff's demand that they talk about the incident outside the presence of Starkey and Harvey. Neither, however, observed any physical contact between Wilson and plaintiff.

Plaintiff contends that Wilson "head butted" him and that he struck Wilson in the face in self-defense. Wilson denies striking the first blow, and states that plaintiff hit him in the face. Both Starkey and Harvey observed that, immediately after the incident, one side of Wilson's face was very red. It is not disputed that, although Wilson later sought emergency-room treatment, no serious injury resulted.

It is not disputed that, immediately after the incident, Wilson telephoned Assistant Fire Chief Johnny Vaughn; he told Vaughn that he and plaintiff had a "personnel problem" and asked Vaughn to come to the station as soon as possible.

Vaughn did so, and privately spoke with plaintiff and then with Wilson. He also spoke with Starkey and Harvey. Vaughn believed both plaintiff and Wilson remained too agitated to work, and he asked both to leave for the day. He also asked each to write a statement concerning what had occurred; he asked firemen Starkey and Harvey to write statements.

It is not disputed that Vaughn reported the occurrence to Fire Chief John Dutch and, upon receipt of the written statements, submitted a memorandum discussing his interviews with the individuals and attaching their statements. On November 30, 1998, a pre-disciplinary hearing took place. It was attended by plaintiff and his attorney, Fire Chief Dutch, Assistant Fire Chief Vaughn, an assistant city attorney, and the president of the firefighters' union. On December 4, 1998, Dutch sent a memorandum to George Shirley, the City's Personnel Director, in which Dutch recommended plaintiffs termination. The memorandum provides the following reasons for the recommended termination:

> In summary it is my finding that Captain Watts did verbally abuse a subordinate using loud, offensive, profane, and vulgar language; that Watts did direct physically aggressive movements toward a subordinate; that Watts' actions have, in fact, intimated and frightened employees in the Fire Department; and that Watts did physically strike a subordinate employee. Such acts of violence cannot be tolerated in the workplace.

Defendant's Exhibit 0. The memorandum reflects that personnel director George Shirley concurred with the decision to terminate plaintiffs[2]. Id

It is not disputed that plaintiff received a copy of this memorandum and, on December 10, 1998, filed a union grievance to protest his termination. On January 4, 1999, the City Manager issued a written response to the grievance.

Defendant's Exhibit I. The City Manager changed the recommended disciplinary action to demotion from the position of captain to the position of firefighter; his memorandum advised plaintiff of his right to further pursue the grievance in accordance with union procedures. Id Plaintiff did not do so, but instead retired from the fire department. A copy of plaintiff's letter stating his intent to retire is included as the last unnumbered page of defendant's Exhibit J. Thereafter, plaintiff filed a Title VII claim of race discrimination with the Equal Employment Opportunity Commission, and this lawsuit followed.

Plaintiff's claims of racial discrimination are based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII") and 42 U.S.C. §1981; both statutes prohibit race discrimination in connection with employment. The plaintiff's burden of establishing a prima facie case of racial discrimination in employment is the same under the two statutes. Reynolds v. School District No. 1, 69 F.3d 1523, 1531(10" Cir. 1995). To establish a prima facie case, plaintiff must prove that 1) he is a member of a protected class; 2) he suffered an adverse employment action; 3) he was performing his job satisfactorily at the time; and 4) similarly situated white employees were treated more favorably McDonnell Douglas Corp v Green 411 U.S. 792 802 (1973) If he satisfies this burden, then defendant has the burden of articulating a legitimate, nondiscriminatory reason for the adverse employment action. Reynolds, 69 F.3d at 1533. Defendant's burden of presenting a justifiable business reason for its decision is a burden of production and not of proof. McDonnell Douglas, 411 U.S. at 804-05. If defendant makes such a showing, the burden reverts to the plaintiff to prove that the proffered nondiscriminatory reason is a mere pretext for discrimination. Reynolds, 69 F. 3d at 1533, citing McDonnell Douglas, 411 U.S. at 804. To establish pretext plaintiff must show either that "a discriminatory reason more likely motivated the employer or.. .that the employer's proffered explanation is unworthy of credence." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). He may overcome summary judgment by demonstrating such "weaknesses, implausibilities, inconsistencies, incoherencies,

or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).

In this case, it is not disputed that plaintiff is a member of a protected class. Defendant disputes that he suffered an adverse employment action because it contends that a demotion does not qualify and that the decision was not final because plaintiff had further avenues of review through the grievance procedure. Further, defendant contends, plaintiff was not performing satisfactorily because he struck a subordinate.

The term "adverse employment action" is "liberally defined" in this circuit. Sanchez v. Denver Public Schools, 164 F.3d 527, 532 (10th Cir. 1998). It is not limited to termination, but is determined according to the "unique factors relevant to the situation at hand." Id, citing Jeffries v. Kansas, 147 F.3d 1220, 1232 (10th Cir. 1998). An adverse employment action is one which "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." 164 F.3d at 532, citing Burlington Indus.. Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

Here, the Fire Chiefs initial recommendation to terminate plaintiffs employment was changed by the City Manager to a demotion from captain to firefighter. The evidence before the court does not clearly state that plaintiff's pay would have been reduced in that position[3]. That omission is not dispositive, however, because an adverse employment action is not limited to a reduction in salary. Sanchez, 164 F.3d at 532. The evidence before the court reflects that a demotion from the position of captain to that of firefighter was a reassignment with significantly different responsibilities, no supervisory duties, and a reduction in status or rank. Therefore, the demotion would constitute an adverse employment action. As a result, for purposes of this motion, plaintiff can satisfy this element of his prima facie case.

Defendant further argues, however, that the demotion never occurred because plaintiff chose to retire rather pursue the next grievance step under the union contract by requesting arbitration by a neutral arbitrator. In fact, defendant argues, the demotion was not final until plaintiff exhausted the union grievance procedures. Because plaintiff chose to retire instead of pursuing his grievance rights, defendant contends, no demotion or adverse employment action occurred.

The court disagrees. The recommendation to terminate, ultimately changed to a decision to demote, was sufficiently adverse to support a prima facie case While it is true that plaintiff had a right to further pursue this matter through arbitration, he would have been demoted to the position of firefighter while awaiting a final decision on the grievance. Memorandum from City Manager Ron Wood, Defendant's Exhibit I, p. 2. A reversal of the recommended demotion would have been favorable to him; however, that outcome was not guaranteed. The evidence also reflects that his retirement while he held the position of captain would result in greater retirement benefits than he would have received if he had retired after a decision to demote him became final. George Shirley dep., Plaintiffs Exhibit 2, pp. 98-99.

There is sufficient evidence before the court to create a factual dispute regarding the adverse impact of the City's action. Therefore, summary judgment is improper on the basis of this element of plaintiffs prima facie case

Defendant further argues that plaintiff cannot establish that he was performing satisfactorily because his conduct in verbally abusing and physically striking a subordinate was against the fire department's policy. It is not disputed that, until the incident at issue, plaintiff had satisfactorily performed his work for the fire department for 23 years; he had no prior disciplinary record.

Because the only claim of unsatisfactory performance is the very incident which led to this lawsuit, the question is whether one incident in 23 years, which resulted in a recommended demotion, precludes a finding that plaintiff

was satisfactorily performing his job. Although neither party submits authority on this point, the court concludes that plaintiff should not be precluded from establishing this element of his prima facie case where, as here, the only incident of unsatisfactory performance is the occurrence on which the allegedly improper termination was based. There is sufficient evidence to create a factual dispute with regard to a prima facie case; therefore, summary judgment may not be granted on that basis.

The court further concludes that defendant has satisfied its burden of producing a nondiscriminatory reason for disciplining plaintiff in that its basis for doing so is the fact that plaintiff hit a subordinate employee while in the course of his employment and used profane and abusive language, in violation of department policy. Therefore, the question raised by defendant's motion is whether plaintiff has sufficient evidence to create a material factual dispute concerning whether defendant's nondiscriminatory reason is mere pretext for intentional race discrimination.

Plaintiff concedes that he has no direct evidence that defendant's action was racially motivated. The absence of direct evidence is not, however, dispositive. If plaintiff establishes a prima facie case and submits sufficient evidence to create a material factual dispute regarding pretext, he need not present direct proof of an illegal discriminatory motive. Randle v. City of Aurora. 69 F.3d 441, 452-53 (10th Cir. 1995). Here, plaintiff argues that the circumstances create an inference sufficient to submit the question of pretext to a jury.

To satisfy his burden of establishing pretext, plaintiff must submit more than a "mere scintilla" of evidence; his evidence must be such that a reasonable jury could find that defendant's reason was pretextual. McDonnell Douglas, 411 U.S. at 804. Plaintiff cannot satisfy this burden by relying on his own personal beliefs, suspicions, or feelings; rather, he must submit facts from which a jury could reasonably conclude that the real reason for defendant's action was intentional race discrimination. Mobley v. Dillon Companies, Inc., 1998 W.L. 314589 (10th Cir. 1998)[4], citing Holt v. KMI-

Continental. Inc., 95 F.3d 123, 130 (2d Cir. 1996), cert. denied, 520 U.S. 1228 (1997).

Plaintiff offers evidence that, when he was first hired in 1976, there was an atmosphere of racial discrimination in the City fire department. He offers his own testimony, plus that of personnel manager George C. Shirley, who is also black and was hired by the City soon after plaintiff's employment. Shirley testified that, when he was hired in 1976, he was warned that there would be whites who would make racially derogatory remarks; he testified that he experienced such treatment. Shirley dep., Plaintiff's Exhibit 2, p. 36, lines 2-25; p. 37. Plaintiff testified that, when he was hired in 1976 as the City's first black firefighter, he was also warned to expect such treatment and that he did experience such treatment. Plaintiff's dep., Plaintiff's Exhibit 5, pp. 10-13. Plaintiff also offers the affidavit of Fred Henderson, a 15-year black employee of the City's fire department; Henderson states that he was subjected to racially derogatory remarks when he first joined the fire department in 1985[5]. Plaintiffs Exhibit 6. However, he asked that the comments stop, and they did. Id.

Past discrimination may properly be considered evidence of current discriminatory intent in a disparate treatment case Lowe v Angelo's Italian Foods Inc., 87 F 3d 1170 1175 (10th Cir 1996), citing Pitre v. Western Elec. Co., 843 F.2d 1262, 1267 (10th Cir. 1988). "Particularly when a company's decision-making process has not changed, evidence of prior discrimination 'might in some circumstances support the inference that such discrimination continued." Pitre, 842 F.2d at 1267, citing Bazemore v. Friday, 478 U.S. 385, 402 (1986). Such evidence is usually considered in cases in which the plaintiff alleges that the employer has engaged in a pattern or practice of discrimination over a period of time. See, e.g., Pitre. Here, however, plaintiff alleges only that the disciplinary action taken against him was discriminatory and he offers evidence of previous racial incidents only to support an inference that the disciplinary action was racially motivated.

That he does not allege a pattern and practice of discrimination does not mean that evidence of past events cannot be considered; however, plaintiff must show a causal connection between those events and the alleged discriminatory action. Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 531 (10th Cir. 1994). Even if plaintiff submits evidence of racially derogatory comments or conduct personally directed toward him, those actions do not support an inference of discrimination unless they have a causal connection to the challenged employment action; statements by decision makers unrelated to the decisional process at issue "do not suffice to satisfy the plaintiff's burden." Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989). Plaintiff must establish a nexus between the allegedly discriminatory remarks and the adverse employment decision. Cone, 14 F.3d at 531. See also Equal Employment Opportunity Comm'n v. Wiltel, Inc., 81 F.3d 1508, 1513 (10th Cir. 1996).(proof that a decision maker made a derogatory remark about plaintiffs religious beliefs was not sufficient to create a factual dispute regarding pretext for religious discrimination where there was no evidence of any connection between the remark and the subsequent adverse action); Jones v. Oklahoma Employment Security Comm'n, 1998 WL 703325 (10th Cir. 1998) (proof that a decision maker had made racial slurs in the past was insufficient to create a factual dispute regarding pretext where there was no connection shown between the comments and the employment decision at issue.)

Similarly, past discriminatory conduct which is remote in time does not constitute evidence that the employer's reason for the challenged action is pretextual. Essex v. United Parcel Service, 111 F. 3d 1304, 1310 (7th Cir. 1997) (Evidence that plaintiff was subjected to discriminatory treatment ten years prior to the challenged action was too remote to create a factual dispute regarding pretext).

In this case, plaintiff argues that discriminatory intent can be inferred from the fact that, when he was hired in 1976, both he and personnel director Shirley were subjected to racially derogatory comments. Such conduct and comments occurring more than twenty years prior to the disciplinary action at issue are too remote in time to create an inference

that defendant's 1998 conduct was racially motivated. Similarly, the racially derogatory remarks directed at firefighter Henderson in 1985 are too remote to support an inference that plaintiffs 1998 recommended demotion was racially motivated; neither is there any evidence that conduct by an individual toward Henderson has any connection to the disciplinary action against plaintiff thirteen years later.

Plaintiff also offers the testimony of personnel director Shirley that, despite his efforts, the City has not made significant progress in hiring black firefighters. Shirley Dep., Plaintiffs Exhibit 2, p. 19. There are six blacks employed by the fire department. Id., p. 35, lines 9-19. There are 123 employees in the fire department, including administrative staff Johnny Vaughn dep., Plaintiffs Exhibit 3, p. 23, lines 9-17. Shirley also testified, however, that it is difficult for the City to recruit black employees because salary scales are higher in nearby Oklahoma City. Shirley dep., Plaintiffs Exhibit 2, p. 19, lines 5-16. According to Mr. Shirley, "It's very difficult to have minorities to come here and work for a lesser salary than they can receive for doing the same thing in like in Oklahoma City, when most of them live in Oklahoma City, but I feel that we've—we've done as well as possible in some cases, and other cases we haven't done — we haven't done as much as we could have done." Id., p. 19, lines 5-16.

Shirley's belief that the City could do more to hire or promote minorities does not support the inference that plaintiffs disciplinary action was racially motivated, in fact, there is no evidence that Shirley believed the action to be racially motivated. Moreover, the record reflects that, on at least one occasion, Shirley refused to participate in an employment decision which he believed was racially motivated, Shirley dep., p. 21. Specifically, he believed the employee was denied a promotion because she is black,[6] and he actively objected. Id. There is no evidence that Shirley opposed the decision regarding plaintiff. In fact, the evidence shows that he concurred with the decision reflected in the initial memorandum recommending termination. Defendant's Exhibit G.

Plaintiff also argues at some length about his opposition to a hazing procedure which had been practiced in the fire department; he refused to participate and, apparently, refused to permit the practice by his subordinates while he was a captain. There is some evidence that firefighters complained about plaintiffs refusal to allow the practice. Shirley dep., Plaintiffs Exhibit 2, p. 70. The practice was ultimately stopped. Id., p. Henderson also discusses attempts by white firefighters, wearing white hoods, to haze him; he refused to participate. Henderson Affidavit, Plaintiffs Exhibit 6, Defendant's Reply Exhibit G. While all witnesses justifiably criticize this practice, there is no evidence that it was ever applied only to black firefighters. On the contrary, the evidence is that all new firefighters were subjected to the practice or at least threatened with it. Charles Wilson dep., Plaintiffs Exhibit 1, p. 151-152. Ultimately, in 1996 or 1997, the department directed that no hazing occur. Shirley dep., Plaintiffs Exhibit 2, p. 70. Plaintiff has not articulated a basis for connecting his opposition to this practice to the incident with Wilson or, more important, to the disciplinary action taken against him.

Past incidents of racial discrimination in the City's fire department, no matter how repugnant, are too remote in time to support the existence of a factual dispute with regard to the reasons plaintiff was disciplined. There is no evidence that these previous incidents have any causal connection to the disciplinary action. Neither does the current small percentage of black employees in the fire department support plaintiffs claim. That plaintiff was the only black captain and was subjected to disciplinary action does not support an inference of discrimination; plaintiff had been a captain for approximately ten years, and he offers no evidence of any racially discriminatory conduct toward him during his tenure. There is no evidentiary support for a contention that, after ten years, the City decided to terminate or demote the only black captain in the department. Therefore, evidence of these incidents is not sufficient to create a factual dispute as to whether defendant's reason for recommending plaintiffs 1998 demotion was a pretext for racial discrimination.

Plaintiffs primary focus, however, is the incident with Wilson. Although plaintiff admits hitting Wilson, he argues at length that Wilson was the aggressor and that plaintiff acted only in self defense. According to plaintiff, the fact that the City did not accept his version of the incident is evidence of racial discrimination. Further, plaintiff implies, the fact that the only disciplinary action against Wilson was reassigning him to another station supports an inference that the action against plaintiff was racially motivated.

Plaintiff asserts the arguments that he submitted after the incident in connection with the department's investigation of same and the same arguments he apparently offered at the predisciplinary hearing[7]. Plaintiff obviously disagrees with the defendant's conclusion that plaintiff acted improperly and the conclusion that there was no corroborative evidence supporting plaintiffs statement that Wilson head butted" him causing him to strike him in self-defense.

Whether plaintiffs version of the incident is true is not, however, the issue before the court in this lawsuit. The issue is whether the disciplinary action taken by defendant against plaintiff was racially motivated. Even if the court believes the defendant's action was based on inaccurate information, poor judgment, or was too harsh, that does not mean that defendant violated Title VII or §1981 when it took that action. In determining whether there is sufficient evidence to create a factual dispute regarding pretext, courts do not "sit as 'super-personnel departments' free to second-guess the business judgment of an employer." Bullington v. United Airlines, 186 F.3d 1301, 1318, n 14 (10th Cir. 1999), citing Simms v. State of Oklahoma. cx rel. Department of Mental Health and Substance Abuse Services, 165 F.3d 1321, 1330 (10th Cir. 1999). "The relevant inquiry is not whether [defendant's] proffered reasons were wise, fair or correct, but whether [defendant] honestly believed those reasons and acted in good faith upon those beliefs" or was acting with discriminatory animus. Bullington, 186 F.3d at 1318.

Although plaintiff clearly believes that defendant's action was motivated by discriminatory animus, his beliefs

are not sufficient to create a factual dispute on the issue of pretext. The evidence is not sufficient to create a material factual dispute that defendant's conduct was a mere pretext for racial discrimination[8]. Accordingly, defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED this _____ day of May, 2000.

UNITED STATES DISTRICT JUDGE

Footnotes

[1] The parties are not in complete agreement as to what started the confrontation. However, plaintiff states that he was doing personal laundry as well as some station laundry and that Wilson criticized him for tying up the machines with personal laundry. Plaintiff asked Starkey and Harvey if they had a problem with the way he was handling the station, and they indicated there was no problem. Plaintiff then asked to speak to Wilson privately, and Wilson refused. Wilson, according to plaintiff, told Starkey and Harvey not to leave the room, but plaintiff directed them to do so and they complied.

[2] Shirley testified in his deposition that, consistent with his procedures, others were authorized to sign routine documents on his behalf, and the approval portion of the recommendation to terminate plaintiff was signed by someone else acting under Shirley's authority. Shirley deposition, plaintiff's Exhibit 2, p. 91, lines 13-25; p. 92, lines 1-6. Shirley did not, however, indicate that he disagreed with the recommendation.

[3] Although neither party has provided documentation evidencing the resulting salary, the City Manager's memorandum states that plaintiffs salary will be that provided at "Range 1-24, Step 7 of the Current Pay Plan." Defendant's Exhibit I page 2 ¶ 2 George Shirley the City s personnel director testified in his deposition that plaintiffs salary as a captain was at the Step 7 level. Shirley dep

plaintiffs Exhibit 2 p 86 lines 2-13 Shirley also testified however that the pay range for a captain is approximately $45 000 per year while that of a firefighter is approximately $20,000 to $25,000. Shirley dep., plaintiff's Exhibit 2, p. 115, lines 8-2 1. Therefore, it is unclear from the evidence whether the demotion would have reduced plaintiff's salary.

[4]This and all other unpublished decisions of the Tenth Circuit Court of Appeals cited herein are cited as persuasive authority pursuant to Tenth Circuit Court Rule 36.3

[5]Henderson submits a second affidavit in which he points out inaccuracies in the affidavit submitted by plaintiff. Exhibit G to defendant's reply brief. To the extent that his two affidavits create an issue regarding credibility his testimony cannot properly be considered because credibility issues cannot be determined in a summary judgment motion. Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 533 (10th Cir. 1994). However, his testimony with respect to the treatment he experienced soon after his employment in 1985 is consistent in the two affidavits.

[6] Shirley testified that he also believes the City retaliated against him for his disagreement, and he has filed a lawsuit alleging unlawful retaliation. Shirley dep., Plaintiffs Exhibit 2, pp. 20-2 1.

[7] No transcript or other written record of the pre-disciplinary hearing is submitted by either party. However, the subsequent memorandum of the City Manager reflects that plaintiffs comments in that hearing were consistent with his written reports of the incident.

[8]Because the court has reached this conclusion, it need not address defendant's argument regarding exhaustion of plaintiffs union remedies.

CASE NO. CIV-99-1235-T

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

GREGORY C. WATTS,
Plaintiff,

vs.

THE CITY OF NORMAN,
Defendant.

Filed May 23, 2000

JUDGEMENT

In accordance with the separate order entered herein granting the defendant's motion for summary judgment on plaintiff's claims, judgment is entered in favor of defendant and against plaintiff on all claims asserted by plaintiff.

IT IS SO ORDERED this 23, day of May 2000.

UNITED STATES DISTRICT JUDGE

No. 00-6208

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GREGORY C. WATTS,
Plaintiff-Appellant

v.

THE CITY OF NORMAN, a political subdivision
of the State of Oklahoma,
Defendant-Appellee.

Filed December 5, 2001

ORDER

Before TACHA, GIBSON*, and LUCERO, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the en banc petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Deputy Clerk

Footnotes

* The Honorable John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Supreme Court, U.S.
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No. 01-1299

In The

Supreme Court of the United States

GREGORY C. WATTS,

Petitioner,

v.

THE CITY OF NORMAN, a political subdivision of the State of Oklahoma,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether The Tenth Circuit's Ruling That Watts, A Supervisor, Is Not Similarly Situated To Wilson, Watts' Subordinate, Is In Conflict With Decisions From Other Circuit Courts Of Appeal.

2. Whether Reversal Of The Tenth Circuit's Supervisor/Subordinate Ruling Would Change The Outcome Of This Case.

3. Whether Watts Has Standing To Challenge The Tenth Circuit's Ruling That He Established A *Prima Facie* Case Of Employment Discrimination Under The *McDonnell Douglas* Standard.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 3

1. Statement of Facts 3

2. Course of the Proceeding Below 6

PERCEIVED MISSTATEMENT OF FACT AND LAW IN WATTS' PETITION 9

1. Watts' Misstatement Regarding the Course of the Proceedings Below 9

A. The District Court Did Not Find That Watts Established That He Was Treated Differently Than Similarly Situated Individuals At The *Prima Facie* Case Stage Of The *McDonnell Douglas* Standard 9

2. Watts' Misstatement Regarding the Facts 10

A. After He Conducted An Investigation Into The October 31, 1998 Incident Between Watts And Wilson, Assistant Chief Vaughn Believed That Only Watts Should Be Dismissed 10

B. Watts Was Disciplined For His Failure *As A Supervisor* To Manage And De-escalate The October 31, 1998 Incident That Culminated In A Physical Confrontation. 11

TABLE OF CONTENTS – Continued

Page

REASONS FOR DENYING THE PETITION..... 12

1. The Tenth Circuit's Decision Regarding Watts' Argument That He Is "Similarly Situated" to Wilson, His Subordinate, Is Not In Conflict With The Decisions From Other Circuits Cited In Watts' Petition..... 12

   A. First Circuit..... 13

   B. Second Circuit..... 13

   C. Fifth Circuit..... 16

   D. Sixth Circuit..... 16

   E. Eighth Circuit..... 19

   F. Eleventh Circuit..... 20

2. Even If This Court Concluded That The Decision Of The Tenth Circuit In *Watts* Is In Conflict With The Decisions Outlined In Watts' Petition, Said Petition Should Still Be Denied Because Resolution Of The Supervisor/Subordinate Issue Would Not Change The Outcome Of This Case..... 21

3. Watts Lacks Standing To Challenge The Tenth Circuit's Ruling That He Established A *Prima Facie* Case Of Employment Discrimination Under The *McDonnell Douglas* Standard..... 22

CONCLUSION..... 23

TABLE OF AUTHORITIES

Page

CASES

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998) 17, 18, 19

Graham v. Long Island R.R., 230 F.3d 34 (2nd Cir. 2000) 13, 14

Hargett v. Nat'l Westminster Bank, U.S.A., 78 F.3d 836 (2nd Cir. 1996), *cert. denied*, 519 U.S. 824 (1996) 14, 15

Harvey v. Anheuser-Busch, Inc., 38 F.3d 968 (8th Cir. 1994) 19

Manniccia v. Brown, 171 F.3d 1364 (11th Cir. 1999) ... 20, 21

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 12

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992) 16, 17, 18

Okoye v. University of Texas Houston Health Science Center, 245 F.3d 507 (5th Cir. 2001) 16

Perkins v. Brigham & Women's Hosp., 78 F.3d 747 (1st Cir. 1996) 13

Public Service Commission of Missouri v. Brashear Freight Lines, 306 U.S. 204 (1939) 22

Taylor v. Brentwood Union Free Sch. Dist., 143 F.3d 679 (2nd Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999) 15, 16

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 12

TABLE OF AUTHORITIES – Continued

Page

Ward v. Procter & Gamble Paper Products Co., 111 F.3d 558 (8th Cir. 1997) 19, 20

Watts v. City of Norman, 270 F.3d 1288 (10th Cir. 2001) ..... *passim*

STATUTES

42 U.S.C. § 1983 15

42 U.S.C. § 2000e, et seq. 6

RULES

United States Supreme Court Rule 15 9

Federal Rule of Civil Procedure 56 6

OTHER

Wright & A. Miller, Federal Practice and Procedure Juris. § 4004.3 (2d ed. 2002) 21

David L. Hudson, Jr., *Will the Sixth Circuit Stick to One Standard with Respect to Similarly Situated Employees*, Tenn. B.J. 25 (November 2001) 18

INTRODUCTION

In the Court below, the three-judge panel for the Tenth Circuit Court of Appeals unanimously affirmed the district court's ruling that Respondent, the City of Norman, Oklahoma (City) was entitled to summary judgment in this employment discrimination case because Petitioner, Gregory C. Watts (Watts), failed to establish a material dispute of fact on the issue of pretext. *Watts v. City of Norman*, 270 F.3d 1288, 1297 (10th Cir. 2001). On appeal, Watts argued that evidence of pretext exists because the non-minority subordinate, Fireman Charles Wilson (Wilson), who was also involved in the October 31, 1998 incident that resulted in discipline against Watts, was not also subject to the same discipline. Watts believes that he is similarly situated when compared to the subordinate, and thus he argues that the comparison creates a question of fact sufficient to submit the issue of pretext to a jury.

The Tenth Circuit rejected Watts' argument finding that Watts and Wilson were not similarly situated because: (1) the basis for Watts' discipline was his failure *as a supervisor* to manage and de-escalate the situation that culminated in the physical confrontation – a job responsibility not shared by the subordinate; and (2) the qualitative evidence presented to the decision maker at the time the disciplinary decision was being made differed substantially as it related to Watts and Wilson. The Tenth Circuit identified the standard for determining whether employees are similarly situated at the pretext stage of an employment discrimination case evaluated under the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) standard as a showing that the employer treated the

plaintiff differently from other similarly situated employees who violated work rules of comparable seriousness. *Id.* at 1295-1296 (citations omitted).

Watts' Petition for Writ of Certiorari to this Court argues that the Tenth Circuit determination that Watts and Wilson were not similarly situated, on the basis of "supervisor" to "subordinate" is not in harmony with Court of Appeals' decisions in other Circuits. Watts' Petition for Writ of Certiorari (Petition) at 6. However, as will be shown below, this Court should deny Watts' Petition because the Tenth Circuit's ruling that Watts is not similarly situated to the subordinate firefighter in any respect relevant to the pretext issue is based on an appropriate standard and is in harmony with the Court of Appeals' decisions outlined in Watts' Petition.

In addition, even if this Court were to conclude that the Tenth Circuit's supervisor/subordinate ruling is not in harmony with the decisions cited in Watts' Petition, this Court should still deny Watts' Petition because resolution of that issue would make no difference to the outcome of this case. As noted above, the Tenth Circuit also ruled that Watts was not similarly situated to Wilson because of the qualitative differences in the evidence considered by the decision makers at the time the disciplinary decision was made. This independent and alternative ruling is sufficient to uphold the Tenth Circuit's conclusion that Watts was not similarly situated to Wilson and it has not been challenged herein.

STATEMENT OF THE CASE

1. Statement of Facts

The City respectfully requests that this Court consider the following Statement of Facts, drawn from the record below, in addition to the facts submitted by Watts.

Watts began working for the City of Norman in April of 1976. He was hired as a firefighter and worked in that position for approximately six (6) years. In 1982, Watts applied for and was promoted to the position of driver. Watts worked as a driver for approximately six (6) years. In 1988, Watts applied for and was promoted to the position of captain. He worked in that position up until his resignation on December 4, 1998. Importantly, other than the decision challenged in this case, Watts does not allege that he was subject to an adverse employment decision during his twenty-two (22) year tenure with the City.

In October 1998, Watts was stationed at Fire Station Number 3 in Norman, Oklahoma. As captain, he was the individual in charge of the Station and responsible for supervising at least three (3) subordinate firefighters when he was on duty. On October 31, 1998, Watts was involved in a physical altercation with a firefighter under his command, Charles Wilson (Wilson), over use of the laundry facilities at the Station. According to the written statements of Watts, the incident began when he and Wilson began their shift at approximately 7:00 am and ended more than an hour later when Watts admittedly cussed Wilson and struck him on the side of his face.

Immediately after the incident, Wilson summoned Assistant Fire Chief John Vaughn (Vaughn) to resolve the conflict. When he arrived at Fire Station Number 3 on October 31, 1998 approximately forty-five (45) minutes after Wilson's call, Assistant Chief Vaughn spoke with Watts and Wilson. During his conversation with Assistant Chief Vaughn, Watts admitted that he cussed and struck Wilson. He also alleged that Wilson head-butted him. However, other than Watts' allegation, there was no evidence, physical or testimonial, to substantiate this allegation. During his conversation with Assistant Chief Vaughn, Wilson denied head-butting Watts and alleged that Watts was the aggressor in the physical altercation. At his deposition, Assistant Chief Vaughn stated that he could tell that Wilson had been struck because his face was "red and puffy."

Assistant Chief Vaughn relayed his conversations and observations to Fire Chief John Dutch (Dutch). Chief Dutch charged Assistant Chief Vaughn with conducting an investigation into the incident between Watts and Wilson. In addition to requesting a written statement from Watts and Wilson, Assistant Chief Vaughn requested written statements from the other firemen on duty at Fire Station 3 on October 31, 1998, Fireman Brian Starkey (Starkey) and Fireman Paul Harvey (Harvey).

In his written statement, Starkey stated that he saw Watts "step very close to Charles and did what I would describe as ranting and raving, flailing his arms and screaming obscenities. The very best I can recall, Greg said 'I'm running this f . . . place you cocksucker. I tell those goddamn guys what to do, not you.' " Starkey then recalls hearing a loud slap. Shortly thereafter, Wilson

contacted him. Although Starkey did not actually see Watts strike Wilson, he noticed that one side of Wilson's face was very "red and puffy."

In his written statement, Harvey stated that he saw Watts, "jump into Charles's face and at the top of his lungs yell, 'I'm fucking in charge here. You're not fucking in charge. I'll tell them what to do.' " Harvey further stated that he walked around the corner of the station and heard what he thought was a slap. Wilson later contacted Harvey and asked whether Harvey saw Watts hit him. Harvey stated that he did not see Watts hit Wilson but noticed that Wilson's face was "very red from the back of the ear to the front part of his jaw."

Based on this evidence, Chief Dutch concluded that Watts had verbally abused a subordinate, made physical contact with a subordinate, and intimidated and frightened employees of the Norman Fire Department. Chief Dutch decided that such acts could not be tolerated in the workplace and decided to terminate Watts' employment. However, under the collective bargaining agreement between the City and the local Firefighter's Union, Chief Dutch's decision was subject to review by the City Manager upon the filing of a grievance by the Union. The Union filed a grievance on Watts' behalf and City Manager Ron Wood (Wood) reviewed Chief Dutch's decision.

After reviewing the facts brought to light by Assistant Chief Vaughn's investigation and meeting with Watts, Watts' legal counsel, and representatives from Watts' Union, Wood decided that disciplinary action was appropriate under the circumstances. Wood reasoned that as supervisor, Watts should not have allowed the incident

to escalate to the point of physical confrontation. However, based on Watts' longevity with the City and his clear disciplinary record, Wood believed that the appropriate level of discipline for Watts was demotion to the non-supervisory position of firefighter. If Watts did not agree with Wood's decision, he could have requested binding arbitration. However, on the apparent advice of legal counsel Watts resigned on December 4, 1998. Thereafter, he filed this lawsuit against the City in the United States District Court for the Western District of Oklahoma alleging that he suffered an adverse employment decision based on his race, African-American, in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (Title VII).

2. Course of the Proceeding Below

Watts filed this lawsuit on August 20, 1999 in the United States District Court for the Western District of Oklahoma. In his Complaint, Watts alleged that he suffered an adverse employment decision based on his race, African-American, in violation of Title VII.

After filing an Answer and conducting discovery, the City moved for summary judgment under Federal Rule of Civil Procedure (FRCP) 56 on the grounds that the undisputed evidence in this case showed that: (1) Watts could not establish a *prima facie* case of employment discrimination under the standard articulated by the Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); (2) Watts could not establish a case of employment discrimination under a "mixed motive" theory; and (3) even if Watts could establish a *prima facie* case of employment

discrimination under the *McDonnell Douglas* standard, there was not a genuine dispute as to whether the legitimate non-discriminatory reason proffered by the City was pretextual – i.e., unworthy of belief.

In his response, Watts argued that he could establish a *prima facie* case of employment discrimination under the *McDonnell Douglas* standard, and proffered allegations of past racial discrimination in the City's Fire Department, hazing, and a comparison between himself and Wilson as evidence of pretext.

On May 23, 2000, the district court granted summary judgment in favor of the City. The district court ruled that although Watts had submitted enough evidence to establish a *prima facie* case of employment discrimination under the *McDonnell Douglas* standard, he did not submit any evidence on the issue of whether the City's legitimate non-discriminatory reason was a mere pretext for discrimination. Importantly, however, although the district court recited as one element of a *prima facie* case under the *McDonnell Douglas* standard the requirement that the plaintiff establish that "similarly situated white employees had been treated more favorably," the district court did not discuss whether Watts had established this element nor did the district court make a specific finding regarding the element.

Watts appealed the district court's ruling to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed the decision of the district court. In its Opinion, the Tenth Circuit correctly concluded that the only issue presented on appeal was whether Watts had presented evidence of pretext – i.e., evidence that a discriminatory reason more

likely motivated the City or that the reason the City gave for its treatment of Watts was unworthy of belief. *Watts*, 270 F.3d at 1294.

Regarding the pretext issue, the Tenth Circuit observed that one of the established methods of proving pretext is to show that the employer treated the plaintiff "differently from other similarly-situated employees who violated work rules of comparable seriousness." After observing its prior precedent regarding the comparison between a supervisor and subordinate in a disciplinary matter and the evidence in the record which showed that the City had heightened employment expectations of its supervisory employees, the Tenth Circuit concluded that Watts, a supervisor, was not similarly situated to Wilson, Watts' subordinate. *Id.* at 1293-1295.

The Tenth Circuit also concluded that Watts was not similarly situated to Wilson because of the qualitative difference in the proof against the two (2) men. Specifically, after noting that the appropriate standard for determining whether a proffered reason for an employment decision was pretextual is to examine the facts "as they appear to the person making the decision," the Tenth Circuit ruled that Watts was not similarly situated to Wilson because the thorough investigation conducted by the City prior to the challenged employment decision revealed the existence of corroborating evidence, including Watts' admission that he struck Wilson, in Watts' case, and the absence of such evidence in Wilson's case. The Tenth Circuit believed that this was a crucial difference from the point of view of an employer trying to decide what disciplinary measures it ought to mete out to the respective employees and, for that matter, what

actions it could later defend if challenged by the disciplined employee. The Tenth Circuit concluded that Watts and Wilson were not similarly situated in this regard either. *Id.* at 1296-1297.

PERCEIVED MISSTATEMENT OF FACT AND LAW IN WATTS' PETITION

In compliance with Supreme Court Rule 15, the following is a list of facts and law that bear on what issues properly would be before the Court if certiorari were granted that were either misstated or omitted by Watts.

1. Watts' Misstatement Regarding the Course of the Proceedings Below

A. The District Court Did Not Find That Watts Established That He Was Treated Differently Than Similarly Situated Individuals At The *Prima Facie* Case Stage Of The *McDonnell Douglas* Standard.

In his Petition, Watts asserts that "Notwithstanding the District Court's determination that Mr. Watts had established a *prima facie* case which included an element of 'similarly situated,' the Tenth Circuit affirmed summary judgment in favor of the City on the basis that Mr. Watts and Mr. Wilson were not 'similarly situated' at the *pretext* stage." Petition at 4. However, as noted above, although the district court recited as one element of a *prima facie* case of employment discrimination as the requirement that evidence be submitted to show that

"similarly situated white employees were treated more favorably," the district court did not address this element in its analysis or make a finding on the issue. The district court did, however, briefly address the issue in terms of whether there was sufficient evidence of pretext to overcome summary judgment.

As further noted above, on appeal, the Tenth Circuit observed that the district court recited but failed to address the similarly situated element, and observed that after the date of the district court's decision, it had ruled that the fourth element of the *prima facie* case of employment discrimination under the *McDonnell Douglas* standard does not require a comparison with a person outside the protected class. *Watts,* 270 F.3d at 1293. However, because the City did not challenge the *prima facie* ruling of the district court, the Appellate Court did not address the issue in depth. Instead, the Tenth Circuit focused its analysis on the pretext issue. Thus, contrary to the assertion in Watts' Petition, the Tenth Circuit did not affirm the district court's "determination that Mr. Watts had established his *prima facie* case which included the element of 'similarly situated.' "

2. Watts' Misstatement Regarding the Facts

A. After He Conducted An Investigation Into The October 31, 1998 Incident Between Watts And Wilson, Assistant Chief Vaughn Believed That Only Watts Should Be Dismissed.

In his Petition, Watts states that "After investigating the fighting incident, the Assistant Fire Chief for the City

of Norman, Johnny Vaughn, thought that both Mr. Watts and Mr. Wilson should be dismissed pursuant to the City's written and unwritten rules concerning fighting among firefighters." Petition at 5. The record in this case shows that after his ***initial meeting*** with Watts and Wilson, Assistant Chief Vaughn believed that both employees would be terminated. The record in this case further shows that after conducting an investigation into the October 31, 1998 incident between Watts and Wilson as directed by Chief Dutch and discussing the results of said investigation with Chief Dutch, Assistant Chief Vaughn changed his opinion regarding the appropriate level of discipline for Wilson only. Assistant Chief Vaughn based his change of opinion on the fact that there was no objective evidence to corroborate Watts' allegation that he was head-butted by Wilson.

B. Watts Was Disciplined For His Failure *As A Supervisor* To Manage And De-escalate The October 31, 1998 Incident That Culminated In A Physical Confrontation.

In his Petition, Watts states that "The City's decision to act contrary to its written and unwritten policies against fighting and discipline only Mr. Watts for the October 31, 1998 fighting incident was motivated by Mr. Watts' race." However, the record in this case shows that the discipline imposed on Watts as a result of the October 31, 1998 incident – i.e., demotion from the supervisory position of fire captain to the non-supervisory position of firefighter – was imposed because Watts, a supervisor, failed to manage and de-escalate the October 31, 1998 incident, and because he cussed and struck a subordinate

during the exercise of his authority as a supervisor in the City's Fire Department. The record does not show that Watts was discplined because he was involved in a fight.

REASONS FOR DENYING THE PETITION

1. The Tenth Circuit's Decision Regarding Watts' Argument That He Is "Similarly Situated" to Wilson, His Subordinate, Is Not In Conflict With The Decisions From Other Circuits Cited In Watts' Petition.

In his Petition, Watts argues that this Court should grant certiorari to resolve "widespread confusion and conflict among and within the Circuits regarding how to define a 'similarly situated' individual in a disparate treatment case based on circumstantial evidence and discriminatory discipline when the case is governed by the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting methodology." To support this argument, Watts cites cases from seven (7) other Circuit Courts alleged to be in conflict with the Tenth Circuit's decision in this case. However, a closer inspection of the cases cited by Watts reveals that the alleged conflict exists in semantics only.

Watts correctly notes that the "similarly situated" analysis used by federal courts to evaluate whether sufficient evidence exists to hold an employer liable for employment discrimination under the *McDonnell Douglas* standard has its genesis in *McDonnell Douglas, McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Following the principles outlined by the Court in these cases, the Tenth Circuit and the Circuit Courts in each of the employment discrimination cases cited by Watts have articulated a standard that focuses on comparing and contrasting the conduct and/or employment expectations of the plaintiff and the individual(s) alleged to be similarly situated. The following is a brief synopsis of the decisions cited by Watts.

A. First Circuit

In the case of *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747 (1st Cir. 1996), the First Circuit identified the standard for determining whether a non-minority employee is similarly situated to the plaintiff at the pretext stage of an employment discrimination case evaluated under the *McDonnell Douglas* standard as: a showing that the individuals with whom the plaintiff seeks to be compared has "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Perkins*, 78 F.3d at 751. Using this standard, the First Circuit concluded that the plaintiff's pattern of work-related sexual harassment did not compare with the misconduct of a non-minority supervisor. *Id.*

B. Second Circuit

Although the court in *Graham v. Long Island R.R.*, 230 F.3d 34 (2nd Cir. 2000) observed that the issue of whether

two employees are "similarly situated" ordinarily presents a question of fact for the jury in a disparate treatment case evaluated under the *McDonnell Douglas* standard, there is no indication in the court's opinion regarding the employment status of the individuals to which the plaintiff compared himself. However, the Second Circuit did identify the standard for determining whether a non-minority employee is similarly situated to the plaintiff at the *prima facie* case stage of the *McDonnell Douglas* standard as: a showing that the plaintiff and the employees to which he compared himself were subject to the same disciplinary standards and have engaged in conduct of comparable seriousness. *Graham*, 230 F.3d at 39-41.

In the case of *Hargett v. Nat'l Westminster Bank, U.S.A.*, 78 F.3d 836 (2nd Cir. 1996), *cert. denied*, 519 U.S. 824 (1996), the Second Circuit was not asked to determine whether the plaintiff was similarly situated to the individual to which the plaintiff compared himself. The issue in *Hargett* was whether the trial court erred by submitting an instruction to the jury that permitted it to consider the employment positions of the plaintiff and the individuals to which he compared himself. The Second Circuit rejected the plaintiff's argument that the Supreme Court ruled out consideration of the positions within the company held by the plaintiff and the individuals to which he compares himself in deciding whether persons treated differently were "similarly situated." *Id.* at 839.

The Second Circuit reasoned that the Court's decision in *McDonnell Douglas* does not imply that the determination of whether acts are of "comparable seriousness" requires a myopic examination of the acts alone without

regard to context or surrounding circumstances. The Second Circuit found that nothing in *McDonnell Douglas* precludes a finding that identical acts undertaken by persons of differing authority or in differing circumstances are in fact dissimilar. To illustrate this point, the Second Circuit noted that one could easily imagine a situation where language that might be tolerated in a back office would be unacceptable at a reception desk. ***The Second Circuit further noted that a corporate officer who is expected to lead others might well be held to a higher standard of conduct than a lower-level functionary.*** *Hargett*, 78 F.3d at 839.

In addition, Watts' suggestion that the mere fact that the similarly situated issue in *Hargett* was submitted to the jury does not support Watts' conclusion that the decisions of the Second Circuit are in conflict with the Tenth Circuit's decision in this case because there is no indication as to whether the defendant in *Hargett* raised the supervisor/subordinate issue in a motion for summary judgment prior to trial.

The Second Circuit's decision in the case of *Taylor v. Brentwood Union Free Sch. Dist.*, 143 F.3d 679 (2nd Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999), does not support Watts' assertion that decisions from the Second Circuit are in conflict with the Tenth Circuit's supervisor/subordinate ruling in this case because: (1) *Taylor* involved a claim brought under 42 U.S.C. § 1983, and not Title VII; and (2) the Second Circuit did not address the defendant's assertion that the district court erred in submitting the issue of whether other school teachers and the plaintiff were similarly situated to the jury.

Furthermore, Watts' suggestion that the mere fact that the similarly situated issue in *Taylor* was submitted to the jury does not support his conclusion that decisions of the Second Circuit are in conflict with the Tenth Circuit's decision. Because the Second Circuit reversed the decision of the trial court on other grounds, it did not address the defendant's assertion that the district court erred by not determining as a matter of law that the school teachers to which the plaintiff compared himself were not similarly situated.

C. Fifth Circuit

In the case of *Okoye v. University of Texas Houston Health Science Center*, 245 F.3d 507 (5th Cir. 2001), the Fifth Circuit identified the standard for determining whether a plaintiff is similarly situated to the individuals to which she compared herself at the pretext stage of the *McDonnell Douglas* standard as: a showing that the misconduct for which the plaintiff was discharged was nearly identical to that engaged in by the other employee. *Okoye*, 245 F.3d at 514. Under this standard, the Fifth Circuit ruled that the plaintiff was not similarly situated to the three (3) physicians to which she compared herself because the physicians were not accused of assaulting a co-worker and they were not barred from the jail where they and the plaintiff worked. *Id.* at 514-515.

D. Sixth Circuit

In the case of *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992), the Sixth Circuit identified the standard for determining whether a plaintiff is similarly situated to

the individuals to which she compared herself at the *prima facie* case stage of the *McDonnell Douglas* standard as: a showing that the individuals with whom the plaintiff seeks to compare his/her treatment: (1) dealt with the same supervisor; (2) were subject to the same standards; and (3) had engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Mitchell,* 964 F.3d at 582-583. Under this standard, the Sixth Circuit found that the plaintiff had not produced any admissible evidence to establish that the white employees she identified as not having been fired although they kept medicare checks and personal checks payable to their employer hidden in their desks and other non-minority employees' absenteeism and insubordination were of "comparable seriousness" to the conduct for which the plaintiff was discharged.

In the case of *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344 (6th Cir. 1998), the Sixth Circuit identified the standard for evaluating whether a plaintiff is similarly situated to the individuals to which he compares himself at the *prima facie* stage of the *McDonnell Douglas* standard as applied to an age discrimination case as: a showing that the plaintiff and the employee with whom the plaintiff seeks to compare himself are similar "in all of the *relevant* aspects." *Ercegovich,* 154 F.3d at 352. Under this standard, the Sixth Circuit ruled that the plaintiff's comparison between himself and two younger employees that were offered new positions after their current positions were eliminated was sufficient to establish the fourth element of a *prima facie* case of age discrimination under the *McDonnell Douglas* standard. *Id.* at 353.

In addition, because the trial court had concluded that the Sixth Circuit's decision in *Mitchell* precluded a finding that the plaintiff was similarly situated to the two younger employees, the Sixth Circuit distinguished its decision in *Mitchell* from facts in *Ercegovich* on the grounds that *Mitchell* involved a disciplinary matter whereas *Ercegovich* did not. The Sixth Circuit cautioned that although the standard articulated in *Mitchell* appears to invite a comparison between the employment status of the plaintiff and other employees in every single aspect of their employment, *Mitchell* had not been so narrowly construed in subsequent opinions. *Ercegovich*, 154 F.3d at 352 (citation omitted).

The Sixth Circuit further cautioned that courts should not assume that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances. Instead, the court instructed, a court should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee. The Sixth Circuit concluded that a plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated." Rather, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in "all of the *relevant* aspects." *Ercegovich*, 154 F.3d at 352.

The Sixth Circuit's clarification of its standard for determining whether individuals are similarly situated in *Ercegovich* is the apparent source of the alleged "intracircuit split" observed by Watts and the legal commentary cited in Watts' Petition. Petition at 16 (citing David L.

Hudson, Jr., *Will the Sixth Circuit Stick to One Standard with Respect to Similarly Situated Employees,* Tenn. B.J. 25 (November 2001)). However, the Sixth Circuit decision in *Ercegovich* clearly states that the factors that should be considered when attempting to determine whether individuals are similarly situated are not static, and thus factors that may be relevant in a disciplinary context are not necessarily relevant in cases arising in a different context. (emphasis added).

E. Eighth Circuit

In the case of *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968 (8th Cir. 1994), the Eighth Circuit identified the standard for determining whether the plaintiff is similarly situated to the individual to which he compares himself at the pretext stage of the *McDonnell Douglas* standard as: a showing that employees are involved in or accused of the same offense and are disciplined in different ways. *Harvey*, 38 F.3d at 972. Under this standard, the Eighth Circuit found that the plaintiff was not similarly situated to his subordinate because although they were involved in the same incident, the evidence showed that the defendant employer held the plaintiff, a supervisor, to a higher standard than the subordinate to which the plaintiff compared himself. *Id.*

In the case of *Ward v. Procter & Gamble Paper Products Co.*, 111 F.3d 558 (8th Cir. 1997), the Eighth Circuit identified the standard for determining whether the plaintiff is similarly situated to the individual to which he compares himself at the pretext stage of the *McDonnell Douglas* standard as a showing that the employees were involved

in or accused of the *same offense* and were disciplined in different ways. *Ward*, 111 F.3d at 560. Under this standard, the Sixth Circuit ruled that the plaintiff was not similarly situated to her supervisor because although they were involved in the same fight, they did not commit the same offense. The Sixth Circuit further ruled that the plaintiff and her supervisor were not similarly situated because they did not hold the same position and they did not share similar employment records. *Id.* at 561.

F. Eleventh Circuit

In the case of *Manniccia v. Brown*, 171 F.3d 1364 (11th Cir. 1999), the Eleventh Circuit identified the standard for determining whether employees are similarly situated for purposes of establishing a *prima facie* case under the *McDonnell Douglas* standard as: a showing that the employees were involved in or accused of the same or similar conduct and were disciplined in different ways. *Manniccia*, 171 F.3d at 1368. The Eleventh Circuit reasoned that it requires that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. *Id.* Under his standard, the Eleventh Circuit found that the plaintiff was not similarly situated to the individuals to which she compared herself because each of the comparators were accused of a single incident of misconduct or alleged misconduct, whereas the plaintiff had committed at least four policy violations. In addition, the Sixth Circuit found that there was no evidence which showed that the comparators had used confidential information accessible

only to police officers for non-police purposes, whereas the plaintiff had. *Id.*

2. Even If This Court Concluded That The Decision Of The Tenth Circuit In *Watts* Is In Conflict With The Decisions Outlined In Watts' Petition, Said Petition Should Still Be Denied Because Resolution Of The Supervisor/Subordinate Issue Would Not Change The Outcome Of This Case.

Even if this Court were to conclude that the decision of the Tenth Circuit in *Watts* regarding a supervisor/subordinate comparison was in conflict with the decisions from other Circuit Courts cited in Watts' Petition, this Court should still deny Watts' Petition because it would be extreme and startling for this Court to grant certiorari to resolve the supervisor/subordinate issue when resolution of that issue in Watts' favor would not change the outcome of this case. See 16B. Wright & A. Miller, Federal Practice and Procedure Juris. § 4004.3, n. 8 (2d ed. 2002) (observing that the grant of certiorari in circumstances that could not lead to reversal would be extreme and startling).

In addition to ruling that Watts, a supervisor, was not similarly situated to Wilson, Watts' subordinate, because the undisputed facts relevant to the reason Watts was disciplined did not apply to Wilson, the Tenth Circuit also ruled that Watts was not similarly situated to Wilson because there were qualitative differences in the evidence considered by the decision makers at the time the disciplinary decision was made. *Watts*, 270 F.3d at 1269. This alternative and independent ruling has not been challenged by Watts. Moreover, it is sufficient to uphold the

decision of the Tenth Circuit in *Watts* regardless of whether the supervisor/subordinate holding of the Tenth Circuit is reversed.

3. Watts Lacks Standing To Challenge The Tenth Circuit's Ruling That He Established A *Prima Facie* Case Of Employment Discrimination Under The *McDonnell Douglas* Standard.

In his Petition, Watts contends that this Court should grant certiorari to resolve an alleged conflict between the Tenth and Seventh Circuits on the issue of "whether to apply the similarly situated test in the *prima facie* case stage of the *McDonnell Douglas* analysis, in the *pretext* stage, or both." However, the Tenth Circuit ruled that Watts established a *prima facie* case of employment discrimination under the *McDonnell Douglas* standard, and thus Watts, the successful party below on this issue, does not have standing to appeal the Tenth Circuit's ruling on this issue. See *Public Service Commission of Missouri v. Brashear Freight Lines*, 306 U.S. 204, 59 S.Ct. 480, 83 L.Ed. 608 (1939) (citations omitted) (observing that the successful party did not have standing to appeal the decision of the court below).

CONCLUSION

Based on the above, and foregoing, the City respectfully requests that Watts Petition for writ of certiorari be denied.

Respectfully submitted,

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No.

In the

Supreme Court of the United States

GREGORY C. WATTS,

Petitioner,

v.

THE CITY OF NORMAN, a political subdivision of the State of Oklahoma,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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12 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. THERE ARE CONFLICTS AMONG THE CIRCUITS AT THE PRIMA FACIE AND PRETEXT STAGES 4

B. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE 5

C. WATTS HAS STANDING 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

ANDERSON V. LIBERTY LOBBY, INC., 477 U.S. 242 (1986) 6

MCDONALD V. SANTA FE TRAIL TRANSP. CO., 427 U.S. 273 (1976).....5, 7

MCDONNELL DOUGLAS CORP. V. GREEN, 411 U.S. 792 (1973)..... PASSIM

PATTERSON V. AVERY DENNISON CORP., 281 F.3D 676 (7TH CIR. 2002).....5

PATTERSON V. MCLEAN CREDIT UNION, 491 U.S. 164 (1989).....4

REEVES V. SANDERSON PLUMBING PRODUCTS, INC., 120 S. CT. 2097 (2000) 2, 3, 6

ST. MARY'S HONOR CENTER V. HICKS, 509 U.S. 502 (1993).....3, 4

SWIERKIEWICZ V. SOREMA N.A., 534 U.S. ____ (2002) 2, 5, 6

TEXAS DEP'T OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981).....2, 3, 5

U.S. POSTAL SERV. BD. OF GOVERNORS V. AIKENS, 460 U.S. 711 (1983).....2, 3

STATUTES

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. 2000(e) *et seq.*.....1, 3, 4, 6, 7

RULES

FED. R. CIV. P. 8 ..... 6, 7

FED. R. CIV. P. 9 6

FED. R. CIV. P. 12(b)(6) 6

FED. R. CIV. P. 50 ..... 6, 7

FED. R. CIV. P. 56 ..... 2, 6, 7

This case is not about semantics as respondent contends in its brief in opposition. Br. in Opp. 12. It is about ridding the workplace of the wretched vestiges of racial discrimination that continue to plague this Nation. Pet. 7-10. It is about providing a civil rights plaintiff with a "full and fair opportunity" to demonstrate unlawful discrimination in an employment discrimination case based on circumstantial evidence and governed by the *McDonnell Douglas* burden-shifting framework.

In most employment discrimination cases, there is no direct evidence of unlawful discrimination–no "smoking gun." Because a guilty employer usually attempts to mask its unlawful discrimination by proffering a legitimate, nondiscriminatory reason for the alleged discriminatory action, a plaintiff is forced to use a similarly situated comparable to demonstrate unlawful discrimination. Pet. 6-7; Br. in Opp. 12.

In *Watts*, the United States Court of Appeals for the Tenth Circuit summarily closed the door on a plaintiff's ability to demonstrate unlawful discrimination by ruling that a *supervisor* may *never* be compared to a *subordinate* as a "*similarly situated*" comparable in a Title VII discriminatory discipline case governed by the *McDonnell Douglas* burden-shifting analysis. The comparison is not legally relevant. Pet. App. 9a. Respondent disputes that there is a conflict among the Circuits by arguing that "*the alleged conflict exists in semantics only.*" Br. in Opp. 12. (emphasis added).

Because the Tenth Circuit's inflexible rule that supervisors and subordinates are never similarly situated for the purpose of demonstrating unlawful discrimination was imposed at the pretext stage of analysis, it impermissibly frustrated this Court's mandate, first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973), that a plaintiff must be given a **full and fair opportunity** to demonstrate by competent evidence that the employer's proffered nondiscriminatory reasons for the alleged discrimination are a pretext for discrimination. Pet. 7-10, 15 n.4.

This case presents important evidentiary questions regarding comparables, circumstantial proof of unlawful discrimination, and the proper role of a court within the application of Rule 56 of the Federal Rules of Civil Procedure to employment discrimination claims governed by the *McDonnell Douglas* analytical framework. This case was decided on summary judgment because the courts below determined that petitioner did not meet his evidentiary burden regarding pretext. Pet. App. 15a-16a, 28a-29a.

Respondent does not dispute that this Title VII case is governed by the *McDonnell Douglas* burden-shifting analysis.[1] Under this approach, first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973), and recently reiterated in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2106 (2000), the Court established the basic allocation of burdens and order of presentation of *proof* in employment discrimination cases based on circumstantial evidence.

First, the plaintiff must establish a prima facie case of discrimination. *Id.* This burden is not onerous. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The plaintiff's relatively light initial burden at this stage of analysis stems from the Court's recognition that acts of discrimination will most often be hidden and subtle. Seldom will there be direct evidence or "eyewitness testimony as to the employer's mental processes." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

After a plaintiff establishes a prima facie case of discrimination,[2] the burden of production, not persuasion, shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the alleged discriminatory action. *Reeves*, 120 S. Ct. at 2106. "[I]t can involve no

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[1] This Court recently observed in *Swierkiewicz v. Sorema N.A.*, 534 U.S. ___, *4 (2002): "In *McDonnell Douglas*, this Court made clear that 'the critical issue before us concern[ed] the order and allocation of *proof* in a private, non-class action challenging employment discrimination."

[2] The elements of the prima facie case are not rigid and may vary from case to case according to the particular facts. *McDonnell Douglas*, 411 U.S. at 802 n. 13.

credibility assessment." *Id.* (*quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993)). Once the employer meets its burden of production, the *McDonnell Douglas* framework and the presumption of discrimination established as a result of the prima facie case simply "drops out of the picture." *Id.* The only issue remaining is "discrimination *vel non*." *Id.* (*quoting Aikens*, 460 U.S. at 714). Moreover, "[a]lthough intermediate evidentiary burdens shift back and forth under this framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* (*quoting Burdine*, 450 U.S. at 253).

However, as this Court observed in *Reeves* and the petitioner alluded to in his petition (at 9-10, 15 n.4):

> "the plaintiff—once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision—must be afforded the "[full and fair] opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."" *Id.*

The respondent does not dispute that petitioner established a prima facie case. Br. in Opp. 22. The sole issue on appeal was whether the City's different treatment and discipline of Watts and Wilson in response to a single fighting incident, in which Watts and Wilson were the only two persons involved, is evidence of pretext—"in other words, evidence that a discriminatory reason more likely motivated the City or that the reason the City gave for its treatment of Watts was unworthy of belief". Pet. 4-5; Pet. App. 9a.

One of the established methods of demonstrating pretext in a discriminatory discipline case is showing that the employer treated the plaintiff "differently from similarly-situated employees who violated work rules of comparable

seriousness." Pet. App. 9a. The Court has consistently made clear that an employment discrimination plaintiff attempting to demonstrate unlawful discrimination "is not limited to presenting evidence of a certain type," because proof of pretext "may take a variety of forms." *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989). "Especially relevant to such a showing" is evidence that the rule or criterion relied on by the employer to explain its decision was applied in a discriminatory manner. Pet. 8-9. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

In this case, the Tenth Circuit imposed a rigid rule that prohibited petitioner from attempting to meet his evidentiary burden of demonstrating pretext in response to a motion for summary judgment by comparing the respondent's different treatment and discipline of his subordinate. In response to a single incident of fighting in violation of respondent's work place rule against fighting, even though the two men, one black, the other white, were the only two persons involved, the employer disciplined only Watts, the black supervisor. Br. in Opp. 8, Pet. App. 12a-13a. Genuine issues of material fact regarding pretext exist because this rigid and mechanized rule impermissibly frustrated petitioner's full and fair opportunity to demonstrate pretext. Watts should be allowed to present his claims to a jury.

A. THERE ARE CONFLICTS AMONG THE CIRCUITS AT THE PRIMA FACIE AND PRETEXT STAGES.

Petitioner is aware of no Circuit (other than the Tenth Circuit) that prohibits the comparison as a matter of law of a supervisor to a subordinate in a Title VII discriminatory discipline case based on circumstantial evidence at the both

the prima facie and pretext stages of analysis. In its brief in opposition, respondent does not cite any contrary authority.

Respondent attempts to minimize the conflicts among the circuits by focusing on the prima facie and pretext aspects of the *McDonnell Douglas* analysis. For example, respondent contends that the Tenth Circuit's decision in *Watts* does not conflict with the Second, Sixth, and Eleventh Circuits because the decisions cited in the petition addressed the similarly situated analysis at the prima facie stage. Br. in Opp. 14, 16-17, 20. However, as explained in the petition, in the Tenth Circuit a supervisor and a subordinate are never similarly situated in the pretext stage and the similarly situated element is no longer an element of a prima facie case. Pet. 15-16. On the other hand, the "similarly situated" element is a part of the prima facie case in the Second, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits. Pet. 13; Br. in Opp. 14, 16-17, 20. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676 (7th Cir. 2002).

B. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE.

As petitioner observes in his petition, this Court formulated the pretext stage of the *McDonnell Douglas* methodology to ensure that a plaintiff has a "*full and fair opportunity*" to show that the employer's proffered nondiscriminatory reason for the alleged discrimination is in fact a pretext for unlawful discrimination. Pet. 9-10, 15-16 n.4. Respondent does not dispute that the "similarly situated" comparable method of demonstrating pretext at issue in this case has its genesis in "*McDonnell Douglas, McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)." Br. in Opp.12.

As petitioner observed in his petition, the *McDonnell Douglas* methodology issues raised in this case are somewhat analogous, albeit under different federal rules of civil procedure, to those recently addressed by this Court in *Swierkiewicz v. Sorema N.A.*, 534 U.S. ____ (2002). Pet. 12

n.3. Unlike the *pleading* issues presented in *Sorema* under Rules 8(a), 9, and 12(b)(6) of the Federal Rules of Civil Procedure, this case presents important *evidentiary burdens* of *proof* issues within the *McDonnell Douglas* framework under Rules 50[3] and 56 of the Federal Rules of Civil Procedure.

In his a*micus curiae* brief in support of the petitioner in *Sorema*,, the Solicitor General observed on behalf of the United States and the Equal Employment Opportunity Commission:

> "This case presents an important question concerning the application of Federal Rule of Civil Procedure 8, which outlines the required content of a complaint, to employment discrimination claims arising under Title VII of the Civil Rights Act of 1964 . . . The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII against public and private employers . . . The Court's decision in this case is likely to affect the enforcement responsibilities of the EEOC and the Attorney General. Furthermore, Title VII . . . appl[ies] to the federal government in its capacity as the nation's largest employer." (citations omitted).

Supreme Court Case No. 00-1853, Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* Supporting Petitioner 1-2.

As in *Sorema*, this case presents important questions concerning the application of the Federal Rules of Civil

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[3] Although this case was decided on *summary judgment* at the pretext stage of analysis under Rule 56 of the Federal Rules of Civil Procedure, this Court has observed that "[t]he standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56." *Reeves*, 120 S. Ct. at 2102. The "inquiry under each is the same." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

Procedure to employment discrimination claims arising under Title VII of the Civil Rights Act of 1964, albeit Rules 50 and 56 rather than Rule 8. As in *Sorema*, the Attorney General and the EEOC share in responsibility for enforcing Title VII, as well as other federal employment discrimination statutes. As in *Sorema*, the Court's decision in this case is likely to affect the enforcement responsibilities of the EEOC and Attorney General. As in *Sorema*, this case concerns the appropriate role of the judge in pretrial stages of litigation. Finally, as in *Sorema*, Title VII applies to the federal government in its capacity as the nation's largest employer.

The Court's recent reiterations of the full and fair opportunity doctrine in *Reeves* and *Hicks*, coupled with a close reading of the Court's underlying reasoning and logic contained in the genesis of the similarly situated analysis in Title VII disparate treatment cases based on circumstantial evidence, first articulated in *McDonnell Douglas* and *McDonald v. Santa Fe Trail Transp. Co.*, clearly support this Court's review of the *Watts* decision.

C. WATTS HAS STANDING

Respondent's assertion on page 22 of its brief that Watts lacks standing to raise the similarly situated issue regarding the prima facie case is unpersuasive in light of its contention on page 10 that "contrary to the assertion in Watts' petition, the Tenth Circuit did not affirm the district court's determination that Mr. Watts had established his *prima facie* case which included the element of 'similarly situated.'" Br. in Opp. 10.

CONCLUSION

For the reasons stated above, and in the petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

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No. 01-1299

In the

Supreme Court of the United States

GREGORY C. WATTS,

Petitioner,

v.

THE CITY OF NORMAN, a political subdivision of the State of Oklahoma,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

This Supplemental Brief is filed pursuant to Sup. Ct. R. 15.8 in order to call the Court's attention to a new case pending that was not available at the time Watts' Reply Brief was filed in this case. Watts respectfully shows the Court as follows:

1. On **May 7, 2002**, the undersigned counsel for Watts, Kenneth Ray Feagins, learned that on **April 16, 2002**, a petition for certiorari has been filed on behalf of an *employer* in another employment discrimination disparate discipline case involving similarly situated comparables, to wit: *Fulton County, et al. v. Lambert, et al.*, No. 01-1568 *("Fulton County")*. *Fulton County* was

docketed on **April 23, 2002** (Response due May 23, 2002) and the cert. petition was unknown and unavailable to the undersigned counsel at the time he filed the Reply Brief on behalf of the petitioner in this case on **April 19, 2002**.

2. *Fulton County* arises out of the Eleventh Circuit and involves the application of Rule 50 of the Federal Rules of Civil Procedure to an employment discrimination disparate discipline case brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII").

3. The *evidentiary burden of proof* issue presented by the ***employee*** in this case is whether the evidence of pretext is sufficient to withstand the employer's motion for summary judgment under **Rule 56** of the Federal Rules of Civil Procedure. Pet. 6-10; Br. in Opp. 10; and, Reply Br. 1-5.

4. The *evidentiary burden of proof* issue presented by the **employer** in *Fulton County* is whether the employees' evidence of pretext **presented at trial** is sufficient to withstand the employer's motion for judgment as a matter of law under **Rule 50** of the Federal Rules of Civil Procedure. *See Fulton County* Petition.

5. As Watts explained in his Reply Brief, this Court has observed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986), and more recently in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2102 (2000), the "inquiry under each is the same." Reply Br. 6 n.3.

6. The evidentiary burdens of proof issues raised under Rule 56 of the Federal Rules of Civil Procedure by the petition in this case and the evidentiary burden of proof issues raised under Rule 50 of the Federal Rules of Civil Procedure by

the petition in *Fulton County* present important questions concerning the application of the Federal Rules of Civil Procedure to employment discrimination claims arising under Title VII. For example, the Attorney General and the EEOC share in responsibility for enforcing Title VII and other federal employment discrimination laws. The Court's decisions in this case and in *Fulton County* are likely to affect the enforcement responsibilities of the EEOC and Attorney General. The Title VII issues raised in this case and by the petition in *Fulton County* apply to the federal government in its capacity as the nation's largest employer. Reply Br. 6.

7. The recent petitions for certiorari filed by both, employees and employers, in *Watts* and *Fulton County*, respectively, and recent articles published by practitioners who represent management, *see* Adam C. Wit, *The 'Similarly Situated Individual': Evidence of Comparable Employees and Its Application in Employment Discrimination Litigation*, 23 Empl. Rel. L.J. 31 (3/Winter 1997), and plaintiffs, *see* David L. Hudson, Jr., *Will the Sixth Circuit Stick to One Standard with Respect to 'Similarly Situated' Employees?*, Tenn. B.J. 25 (November 2001), clearly demonstrate the national importance of, and confusion regarding, the appropriate standard for determining "similarly situated" comparables in Title VII employment discrimination disparate discipline cases based on circumstantial evidence and governed by the *McDonnell Douglas* burden-shifting framework.

CONCLUSION

For the foregoing reasons, those set forth in the Watts' Reply Brief and in the petition, it is respectfully submitted that the petition in this case should be granted.

May 8, 2002.

Respectfully submitted,

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